No. : 03 . 936 DEC 24 2003

In the

Supreme Court of the United States

PETER MELZER,

Plaintiff-Appellant,

-against-

Board of Education of the City of School District of the City of New York, Carol A. Gresser, Irene Impellizzeri, Victor Gotbaum, Michael J. Petrides, Luis O. Reyes, Ninfa Segarra, Dennis M. Walcott, individually and in their official capacities as members of the Board of Education of the City School District of the City of New York, RAMON CORTINES, individually and as Chancellor of the City School District of the City of New York, JOSEPH DEJESUS, individually and as Superintendent of the Bronx High Schools, HOLLIS NEEDLEMAN, individually and as Assistant Superintendent of the Bronx High Schools, EDWARD STANCIK, individually and as Special Commissioner of Investigation for the New York City School District and THE CITY OF NEW YORK,

Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAW OFFICE OF EUGENE B. NATHANSON, ESQ.
Attorney for Plaintiff-Appellant
305 Broadway
New York, New York 10007
(212) 608-6771

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED

1. Should threats of disruption made by opponents of a public employee's beliefs be given any weight in the balancing test established in Pickering v. Board of Education?

2. Did the Second Circuit give excessive weight to speculation about disruption, when it balanced it against a public employee's right to engage in core First Amendment expression?

3. Does a public employee's speech that occurs outside the workplace and is unconnected to it deserve the same First Amendment protection as the speech of a private citizen?

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to this appeal are individuals and a Board of Education. Because no corporations are involved in this matter, there are no parent companies and no subsidiaries to list.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PETER MELZER,

Petitioner,

—v.—

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, CAROL A. GRESSER, IRENE IMPELLIZZERI, VICTOR GOTBAUM, MICHAEL J. PETRIDES, LUIS O. REYES, NINFA SEGARRA, DENNIS M. WALCOTT, individually and in their official capacities as members of the Board of Education of the City School District of the City of New York, RAMON CORTINES, individually and as Chancellor of the City School District of the City of New York, JOSEPH DeJESUS, individually and as Superintendent of the Bronx High Schools, HOLLIS NEEDLEMAN, individually and as Assistant Superintendent of the Bronx High Schools, EDWARD STANCIK, individually and as Special Commissioner of Investigation for the New York City School District, SEAN COURTNEY and THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner respectfully requests that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit on July 16, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals that is the subject of this writ is reported at 336 F.3d 185 (2d Cir. 2003) and is set out in the appendix to this petition at 45-69a. The original District Court opinion is published at 196 F. Supp. 2d 229 (E.D.N.Y. 2002) and is set out in the appendix at 1 - 44a.

JURISDICTION

This is a petition for a writ of *certiorari* from an opinion and judgment of the United States Court of Appeals for the Second Circuit entered on July 16, 2003. That court denied a petition for rehearing and rehearing *en banc* on September 26, 2003 (70a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The pertinent provisions of the United States Constitution involved in this case are found in the First Amendment, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case concerns a public employee who advocated for a political and social cause on his own time, while away from his government employment, and without mentioning his employer, and was fired after opponents of his beliefs threatened to disrupt his place of employment.

Peter Melzer successfully and without complaint taught physics at the prestigious Bronx High School of Science in New York City for 29 years. During most of this period, but on his own time while away from the school, he advocated for the elimination of age-of-consent laws as a leader in NAMBLA, the North American Man-Boy Love Association. At no time did Melzer attempt to bring his advocacy into the school in any way. Parents found out about his role in NAMBLA, and threatened to disrupt school functions if he was allowed to continue teaching. Largely as a result of their threats, Melzer was fired. Although part of the concern expressed by the parents was that their children were endangered by Melzer's presence in the school, Melzer was not fired because of any concern that he had or would victimize students. A 16-month investigation by the Office of the Special Commissioner of Investigations for the New York City School District found no misconduct by Melzer at the school or in connection with his duties.

Melzer brought suit under 42 U.S.C. § 1983 in the Eastern District of New York, alleging that his dismissal violated his First Amendment rights. The Eastern District had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

After a bench trial, the District Court granted judgment to the defendants, applying the balancing test of *Pickering v. Board of Education*.[1] It determined that the threat of disruption outweighed the First Amendment value of Melzer's speech. The District Court employed a "value-based analysis," which found a diminished value to Melzer's speech because it was at odds with social values.[2] The District Court apparently would have ruled in favor of Melzer had it recognized the constitutional value of his speech, because the court said it was "improbable" that advocating adult homosexual rights – to which the court assigned a higher First Amendment value – "could today be outweighed by the perceived likelihood of school disruption."[3]

The Second Circuit affirmed the District Court's judgment. It disagreed with the district court's conclusion

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1. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

2. *Melzer v. Board of Education*, 196 F. Supp. 2d 229, 250 (E.D.N.Y. 2002)(41a).

3. *Ibid.*

that "Melzer's activities are on a different constitutional value scale than other types of First Amendment rights more widely accepted by society"[4] and assumed that Melzer's "First Amendment activity possesses the highest value."[5] Nevertheless, it ruled against Melzer, holding that the Pickering balancing test applied to "First Amendment activities occurring outside the workplace and largely unconnected to it,"[6] and that Melzer's "degree of active involvement in NAMBLA caused disruption to the school's mission and operations justifying the Board's action terminating him."[7]

Reasons for Granting the Writ

I. Permitting a public employer to balance the disruption threatened by opponents of a public employee's speech against the value of that speech authorizes a heckler's veto and creates a split with the Fourth and Tenth Circuits.

Although the Second Circuit acknowledged the

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4. *Melzer v. Board of Education*, 336 F.3d 185, 197 (2d Cir. 2003)(64a).

5. *Id.*, 336 F.3d at 198 (65a).

6. *Id.*, 336 F.3d at 194 (57a).

7. *Id.*, 336 F.3d at 200 (69a).

"truism that community reaction cannot dictate whether an employee's constitutional rights are protected,"[8] and found it "clear that the Board's basic justification for firing Melzer was the community's reaction to the message,"[9] it nevertheless relied on the community's threats to disrupt the school in holding that Melzer's First Amendment rights were outweighed by threatened disruption. The decision in this case solidified and extended the Second Circuit's earlier holding, in *Pappas v. Giuliani*, that the New York City Police Department's interest in maintaining positive community relations justified dismissal of a police officer for his private, expressive activity.[10] The Second Circuit has established a rule that, in a public-employee-free-speech case, the threat of a heckler's veto can outweigh First Amendment rights. The Second Circuit has thus placed itself at odds with the Fourth and Tenth Circuit, which have emphatically held that, under this Court's precedents, a government employee's off-duty speech, unrelated to employment, cannot be curtailed based on the community's opposition to that speech.

The Tenth Circuit rejected this sort of heckler's

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8. *Id.*, 336 F. 3d at 199 (67a)

9. 336 F.3d at 194 (57a).

10. *Pappas v. Giuliani*, 290 F.3d 143, 145-48 (2d Cir. 2002), *cert. denied* – U.S. – , 123 S. Ct. 2642 (2003).

veto in *Flanagan v. Munger,*[11] where police officers were reprimanded for owning a video store whose stock included sexually explicit videotapes. The police department's ostensible concern was that "negative public feelings ... would erode the public's respect and confidence in the police department ... thereby inhibiting the efficiency and effectiveness of it in the community."[12] The Tenth Circuit rejected this justification for the disciplinary action, recognizing how dangerous it is to allow speech to be curtailed because members of the community disagree with it, explaining:

> it is not inconceivable that plaintiffs and defendants might attempt to apply this argument in cases of assembly or religion in which a police officer attends a meeting of a religious or other group to which some members of the public object ... [F]ree exercise of religion and ... freedom of assembly ... could be severely restricted if the external objectors' justification were allowed to be applied in these cases." [13]

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[11] 890 F.2d 1557 (10th Cir. 1989).

[12] *Id.*, at 1566.

[13] *Id.*, at 1567.

The Fourth Circuit faced the conceptually parallel situation of a police officer who, while off-duty, publicly performed early-20th century songs in blackface makeup and a wig, prompting the NAACP and local black citizens to "object vehemently about a police officer's being permitted ... to offer a public insult to members of their race." The Fourth Circuit refused to countenance disciplinary action against the officer, saying:

> [W]e think this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed against that speech.
>
> Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order.[14]

In this case, the Second Circuit thought that

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[14] *Berger v. Battaglia*, 779 F.2d 992, 1000-01 (4th Cir. 1985), *cert. denied* 476 U.S. 1159 (1986).

disruption threatened by parents critical of Melzer's speech should not be considered a hecklers' veto because the parents were not outsiders but were "participants" in the school, and therefore their threats amounted to internal disruption.[15] But if the test to determine whether disruption is cognizable internal disruption or an improper hecklers' veto is based on who causes the disruption, it gives license to some people to restrict speech with which they disagree. Instead, the question should be whether the disruption flows from the speech or is directed against it. This follows from this Court's decision in *Tinker v. Des Moines Independent Community School Dist.*,[16] which rejected limiting speech at a school due to disruption by students, who obviously are participants in the school. In *Tinker,* the public school prohibited some students from wearing black armbands because some other students made hostile remarks to them,[17] students argued in class about the armbands instead of paying attention,[18] and the school was concerned that responses to the armbands might lead other

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15. *Melzer, supra*, 336 F.3d at 199 (68a).

16. 393 U.S. 503 (1969).

17. *Id.*, at 508.

18. *Id.*, at 518, (Black, J., dissenting).

students to start arguments or cause disturbances.[19] This Court held that the school could not restrict some students' speech and association to prevent other students from responding to it disruptively.[20] If disruption by fellow students who object to the speech is an impermissible hecklers' veto, then certainly so is such disruption by parents. Thus, the threat by parents to illegally boycott,[21] organize a sit-down strike, or create a media circus,[22] could not counterbalance Melzer's exercise of First Amendment rights.

Under the Second Circuit's rule established in this case and in *Pappas*, government employees must be circumspect when speaking about any controversial subject: hot-button issues like drug policy, abortion rights, and war are outside the pale, even when the speech is unrelated to the employment. The Second Circuit only slightly limited its holding by noting that a teaching

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19. *Id.*, at 508.

20. *Id.*, at 509.

21. *See, Cavanagh v. Galamison*, 31 A.D.2d 635, 297 N.Y.S.2d 651 (2d Dep't 1968), (organizing boycott of school in civil rights protest is criminal violation of NYS Education Law §3212).

22. *Melzer, supra*, 196 F. Supp. 2d at 238-39 (17a).

position requires a degree of public trust.[23] Many other government workers have equally sensitive relationships with their clients – police officers, social workers, doctors, nurses, corrections officers, librarians – and many issues might be of special concern in each of these jobs. For teachers, the age of consent is not the only dangerously emotional issue, but one of many issues that could evoke a hostile and disruptive response: drug policy, because of adolescent drug use; abortion, because of teen pregnancy; war, with military service of imminent concern to high school students; corporal punishment; the drinking age, and so on. The Second Circuit's decision has a broad sweep that could seriously decrease public discourse.[24]

By allowing threatened disruptive protest to outweigh Melzer's First Amendment rights the Second Circuit not only allowed the kind of heckler's veto which this Court has always disapproved, but also split with the Fourth and Tenth Circuits. This Court should grant *certiorari* to resolve this split and to address a significant

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[23] *Id.* 336 F.3d at 198 (65a).

[24] The Department of the Census reports that there are over 15 million full-time equivalent State and local government employees (www.census.gov/govs/apes/00stlus.txt) and nearly 3 million federal employees (www.census.gov/govs/apes/00fedfun.txt).

curtailment of free speech in this important area.

II. This Court should clarify the weight to be given to predictions of disruption when significant First Amendment rights are involved.

Allowing the government to rely on predicted rather than actual disruption while employing the *Pickering* test could essentially bar off-duty political speech by government employees, because speech on virtually any controversial subject can support a superficially reasonable prediction of disruption. In this case, the prediction was so speculative that it should not have outweighed the significant deprivation of rights Melzer suffered.

The Board of Education resorted to predictions of disruption because there was no actual disruption. The Second Circuit's decision referred to claims of actual disruption in one short paragraph, stating that it was "entirely reasonable for the Board to believe that many parents and students had a strong negative reaction to [Melzer], and that such a reaction caused the school to suffer severe internal disruption,"[25] but neither the Board of Education nor the Second Circuit ever described any actual disruption resulting from this negative reaction. Students or teachers talked about Melzer's ideas and their

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[25] *Melzer, supra*, 336 F.3d at 198 (66a).

relationship to his teaching, and generally strongly disagreed with those ideas, but there was not even a claim, let alone evidence, that these conversations disrupted classes or other school functions.

This case demonstrates how easily a government employer that opposes speech or fears even a hint of unpleasantness[26] can use prediction of disruption to undermine constitutional rights. At Melzer's administrative disciplinary hearing,[27] the Board of Education was able to find an expert witness – a psychologist – who predicted that the average student would be anxious, uncomfortable, and unable to concentrate in Melzer's classroom.[28] This prediction was unsupported by any explanation of a psychological mechanism that would cause the predicted response in an adolescent, by any description of an analogous situation where a similar response arose, or by any reference to a scientific study that supported the conclusion. Plaintiff

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[26] Many public employers are subject to political pressures, and naturally tend to honor the strongly-expressed wishes of constituents.

[27] The case was submitted for trial largely on the record of this administrative hearing *Melzer, supra*, 196 F. Supp. 2d at 232 (2-3a).

[28] *Melzer*, *supra*, 336 F.3d at 199 (66a).

presented his own expert psychiatrist, who explained that there was no evidence and no scientific study from which anyone could predict the reaction of students to having Melzer as a teacher. He thought that there would be no impairment of learning, but concluded that no prediction one way or the other could be made.

The Board of Education's clinical psychologist had minimal qualifications – he worked and opined only in the New York area, primarily as a validator and expert witness for local prosecutors, and had no significant publications or faculty positions. Plaintiff's board-certified psychiatrist was an associate professor at Johns Hopkins University School of Medicine, the founder and director of Johns Hopkins' sexual disorder clinic, a member of the subcommittee on sexual disorders for the Diagnostic and Statistical Manual (DSM-III), and had published extensively. As an expert on sexual disorders and child sex abuse, he had been invited to address a college of several states' judges, a New Jersey Governor's special committee, the Department of Justice, a subcommittee of the United States Senate, and a White House conference. Nevertheless, the district court, which saw the testimony only in transcript so could not distinguish the experts by demeanor, and the Second Circuit, relied on the opinion of the Board of Education's psychologist and ignored plaintiff's psychiatrist.

The Second Circuit's reliance on this expert is at odds with the Eighth Circuit's rejection of a similarly conclusory expert opinion in a First Amendment case.[29] St. Louis County sought to ban violent interactive video games and supported that ban with an argument that it protected the psychological well-being of minors. A psychologist testified for the county that playing violent video games "does in fact lead to aggressive behavior in the immediate situation . . . that more aggressive thoughts are reported and there is frequently more aggressive behavior."[30] But the Eighth Circuit held that "[w]here First Amendment rights are at stake, the Government must present more than anecdote and supposition." A psychologist's general and conclusory comments, with no real information – in that case linking violent video games to psychological harm – does not provide the empirical support needed to restrict First Amendment rights.[31] The psychological testimony submitted by the Board of Education was equally vague and general, and should not have been used to support a conclusion that Melzer's speech threatened to disrupt school functions.

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[29] *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003).

[30] *Id.*, 329 F.3d at 958-59.

[31] *Id.*, 329 F.3d at 959, internal quotation marks and citations omitted.

The point is not only that Melzer should have won the battle of the experts, but how easily and without support a prediction of disruption can be made. If the State needs only an expert's prediction of disruption to outweigh First Amendment rights, then the First Amendment rights have little value, because it is so easy to hire an expert to support any opinion. Indeed, this expert's opinion was obtained *after* the Board of Education preferred disciplinary charges seeking Melzer's termination, and provided an after-the-fact justification for the Board of Education's action.

The Second Circuit and the Board of Education's supposition that parents might withdraw their children from the school[32] was as speculative, and it is just as likely that parents of children attending one of the best public high schools in the country would leave them there instead of placing them in troubled New York City high schools or expensive private schools. Weighed against important free-speech rights, speculation like this should be carefully scrutinized to ensure that predictions of disruption are realistic.

This Court should grant *certiorari* to resolve the dispute between the Second and Eighth Circuits over the use of speculative expert evidence in First Amendment

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[32] *Melzer*, *supra*, 336 F.3d at 199 (67a).

cases, and to clarify how predictions of disruption should be balanced against significant exercises of First Amendment rights.

III. Application of the *Pickering* test to speech unrelated to the job chills speech by government employees on any controversial subject.

As the Second Circuit recognized, this case "diverges from the usual line of cases requiring application of *Pickering*, which ordinarily applies in situations involving speech directed at an employer, made at the place of employment or directly concerning the employer in some way," because Melzer's speech "occur[red] outside the workplace and was largely unconnected to it."[33] Only the Second Circuit has sustained disciplinary action against a public employee for speech unrelated to the public employment, in this case and in *Pappas v. Giuliani*.[34] This Court has never held that the *Pickering* doctrine extends to First Amendment activity conducted away from the workplace and not concerning the workplace, and the tenor of this Court's decisions suggests that it never intended to so dilute the First Amendment rights of individuals who happen to work for the government.

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[33] *Id.*, 336 F.3d at 193-94 (56a-57a).

[34] *Pappas v. Giuliani*, *supra*.

In *Pickering* itself, where "the fact of employment [was] only tangentially and insubstantially involved in the subject matter of the public communication," this Court disregarded its previous "disinclination to make an across-the-board equation of dismissal from public employment ... with awarding damages in a libel suit by a public official for similar criticism."[35] Instead, this Court applied to Pickering's speech the same test that is applied to libel claims by a public official against a private citizen, because "it is necessary to regard [Pickering] as the member of the general public he seeks to be."[36]

Justice White's concurring opinion in *Pickering* confirms that disruption would have been at issue only if the speech had related to the job. He pointed out that the Court held that "Pickering ... is more like a member of the general public and ... too remote from the school board to require placing him in any special category."[37] Justice White therefore questioned why the Court

> re-examin[ed] the facts in order to reject the determination below that Pickering's

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35. *Pickering, supra,* 391 U.S. at 574.

36. *Ibid.*

37. *Id.*, 391 U.S. at 583, at n. 1 (White, J., concurring and dissenting).

> statements harmed the school system ... when the question of harm is clearly irrelevant given the Court's determination that Pickering's statements were neither knowingly nor recklessly false and its ruling that in such circumstances a teacher may not be fired even if the statements are injurious.[38]

In *Connick v. Meyers,* four Justices, including Justice Marshall, who authored *Pickering,* joined an opinion which, in passing, assumed as a truism that public employees' unrelated speech was fully protected, saying, "When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights are, of course, no different from those of the general public."[39] Consistent with this bedrock principle, the majority in *Connick* cautioned that, even in the case of speech at the workplace, "speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring[s] different factors into the *Pickering* calculus, and might lead to a different

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[38] *Id.*, 391 U.S. at 583.

[39] *Connick v. Meyers,* 461 U.S. 138, 157 (1983) (Brennan, Marshall, Blackmun, and Stevens, J.J., dissenting).

conclusion."[40]

The reasons to subject public employees to a balancing test were analyzed in detail in *Waters v. Churchill*, and shown to depend on a connection between the speech and the employment.[41] This Court explained why "the government's role as employer ... gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large" by pointing out that "verbal tumult, discord, and ... offensive utterances," are appropriate to public debate but inappropriate at a job site, and that "uninhibited, robust, and wide-open" debate is appropriate to settle public policy but not to set office policy.[42] This Court concluded that the government-employer has a power to command its employees' support of its goals that the government-sovereign lacks over its citizens, saying:

> The government's interest in achieving its goals as efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when

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40. *Id.*, 461 U.S. at 153 n.13 (majority opinion).

41. *Waters v. Churchill*, 511 U.S. 661 (1994).

42. *Id.*, 511 U.S. at 671-72 (citations and internal quotation marks omitted).

> it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.[43]

It follows that, only when a public employee speaks as an employee at the job or about the job, may the government-employer restrict the speech if it disrupts the government's place of business, but that no such authority to restrict speech applies when a public employee speaks as a private-citizen member of the general public.

The Second Circuit was not swayed by the distinction between employment-related speech and unrelated speech expressed in *Pickering, Connick*, and *Waters,* because it concluded that this Court later sanctioned the concept of the government restricting its employees' unrelated speech.[44] The Second Circuit's conclusion is not supported by *United States v. Treasury*

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[43] *Id.*, 511 U.S. at 675.

[44] *See, Melzer*, *supra*, 336 F.3d at 194 (58a).

Employees,[45] the case it relied upon.

Treasury Employees challenged a statute that barred federal employees from receiving honoraria for speeches and articles, even when the speech or article, or the person or group paying for it, had no connection with the employment. After discussing *Pickering* at length, (*see*, 513 U.S. at 465 - 468), this Court pointed out that, "Because the vast majority of the speech at issue in this case does not involve the subject matter of Government employment and takes place outside the workplace, the Government is unable to justify [the statute] on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it." *Treasury Employees* did not make clear whether the fact that speech is entirely unrelated to public employment is just one consideration in a *Pickering* balance, as the Second Circuit believes,[46] or whether public-employee speech unrelated to employment is instead subject to the same First Amendment analysis applied to members of the general public. This Court should grant *certiorari* to clarify this important distinction.

If public employment limits only speech directed at

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45. *United States v. Treasury Employees,* 513 U.S. 454 (1995).

46. *Melzer, supra*, 336 F.3d at 194 (58a)

the employer, said at the place of employment, or directly concerning the government office, the employee must curb his tongue only in a limited area appropriately circumscribed by employee status. But if the *Pickering* test can be applied to restrict an employee's off-duty participation in a serious, organized movement seeking to change the laws and values of American society, then government employees must be cautious about, and may avoid, engaging in activity that is "a fundamental component of democracy."[47] This Court should grant *certiorari* to answer an important question concerning the participation of public employees in the public forum.

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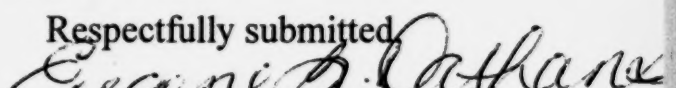
47. *Id.*, 336 F.3d at 196 (A62).

Conclusion

Melzer was engaged in activity fundamental to a free society – organizing with others to democratically change laws and social beliefs – and the Second Circuit appropriately considered Melzer's speech of highest First Amendment value. Melzer's freedom to engage in this crucial activity was curtailed when he was fired, and the standards applied to him may be used against any of the millions of government employees in this country who dares to promote an unpopular cause. Disruption could be predicted any time there is opposition, and the uninhibited marketplace of ideas will suffer if government employees can be chilled from organizing and advocating in the face of threatened opposition. The Second Circuit's decision is at odds with decisions of this Court and the Fourth, Eighth, and Tenth Circuits, and undermines the First Amendment. Petitioner therefore requests that this Court grant a writ of *certiorari* in this matter.

Dated: December 22, 2003
New York, New York

Respectfully submitted,



Eugene B Nathanson
Attorney for Petitioner
305 Broadway, Suite 200
New York, NY 10007-1109
(212)608-6771

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PETER MELZER,

Plaintiff,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, CAROL A. GRESSER, IRENE IMPELLIZZERI, VICTOR GOTBAUM, MICHAEL J. PETRIDES, LUIS O. REYES, NINFA SEGARRA, DENNIS M. WALCOTT, individually and in their official capacities as members of the Board of Education of the City School District of the City of New York, RAMON CORTINES, individually and as Chancellor of the City School District of the City of New York, JOSEPH DeJESUS, individually and as Superintendent of the Bronx High Schools, HOLLIS NEEDLEMAN, individually and as Assistant Superintendent of the Bronx High Schools, EDWARD STANCIK, individually and as Special Commissioner of Investigation for the New York City School District, SEAN COURTNEY and THE CITY OF NEW YORK,

Defendants.

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DECISION AND ORDER
Case No. 93 CV 5942 (FB)

Appearances:
For the Plaintiff:
Eugene B. Nathanson, Esq.
305 Broadway, Suite 200
New York, New York 10007-3024

For the Defendants:
Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
By: Jonathan L. Pines, Esq.
Assistant Corporation Counsel
100 Church Street
New York, New York 10007

BLOCK, District Judge:

Plaintiff, Peter Melzer ("Melzer"), seeks reinstatement to his tenured teaching position at the Bronx High School of Science ("BHSS") claiming, pursuant to 42 U.S.C. § 1983, that he was discharged by the defendant Board of Education of the City School District of the City of New York ("BOE") in retaliation for the exercise of his First Amendment rights as a member of the North American Man-Boy Love Association ("NAMBLA").[1] The discharge was implemented after Melzer, invoking his right to a hearing under New York Education Law § 3020-a, unsuccessfully challenged the BOE's finding of probable cause for his dismissal.[2] The parties have agreed that

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1. Melzer also seeks compensatory damages from the BOE, and compensatory and punitive damages against the individual defendants, who each claim qualified immunity.

2. Under New York Education Law § 3020-a (McKinney 2001), a tenured teacher's discharge is a two-step process: First, the "school district or employing board" must make a finding of "probable cause." § 3020-a(2)(a). Next, the teacher has the right to a hearing before either a single hearing officer or a three member panel, at the teacher's choice, "when the charges concern pedagogical incompetence or issues involving pedagogical judgment;" otherwise, the hearing is before a single hearing officer. § 3020-a(2)(c). Hearing officers are provided by the American Arbitration Association. *See* § 3020-a(3). The hearing officer(s)' decision "shall state what penalty or other action, if any, shall be taken by the employing board,"

the testimony and evidence adduced at the hearing, as supplemented by Melzer's in-court testimony, shall constitute the trial record before the Court. The case being tried without a jury, the following constitutes the Court's findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, resulting in rejection of Melzer's First Amendment claim and dismissal of his complaint. [3]

FACTUAL BACKGROUND

I. Melzer's Teaching Career at BHSS

Melzer graduated from City College with a Bachelor's Degree in Physics in the early 1960's. He started teaching for the BOE in 1963, and is licensed in physics and general science at the high school level and science at the junior high level. At some point early in his teaching career, Melzer received a Master's Degree in Physics Education. In 1968, Melzer began his teaching career at BHSS, where he continued to teach, as a

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§ 3020-a(4), and is subject to judicial review. § 3020-a(5). Pending the hearing officer's decision and mandated implementation of the decision by the employing board, *see* §3020-a(4)(b), the teacher is suspended with pay. *See* § 3020-a(2)(b). The "exhaustion of state remedies, whether administrative or judicial, is not a prerequisite to maintaining an action under § 1983." *Nussle v. Willette*, 224 F.3d 95, 97-98 (2d Cir. 2000)(citing *Patsy v. Board of Regents*, 457 U.S. 496, 508, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982)).

[3] Melzer's complaint also contains a state law claim that he was discharged in violation of New York Labor Law § 201-d(2). Since Melzer's federal claim is dismissed, the Court, in the exercise of its discretion, declines to exercise supplemental jurisdiction over this claim. *See* 28 U.S.C. § 1367(c)(3). Furthermore, dismissal of the complaint renders academic the qualified immunity claims raised by the individual defendants.

tenured teacher, until 1992. For the 1992-93 school year Melzer was on a one-year sabbatical leave. BHSS is a specialized high school that focuses on a science curriculum. To qualify for admission, students take a competitive scholastic achievement test.

Throughout the course of his teaching career at BHSS, Melzer has taught all grade levels, 9 through 12, in physics and science. Melzer has also participated in a volunteer program to teach physics to area junior high school students as part of a special District Outreach Program. Melzer's other school-related activities included involvement with the Physics Club of New York, advising the Bronx High School Science Physical Science Journal, and organizing the Regional Science Olympiad Competition. Melzer has received numerous teaching commendations, and all of his evaluations have been satisfactory.

II. *Melzer's Involvement with NAMBLA*

Established in 1978, NAMBLA's Constitution and Position Papers state that it is "an organization founded in response to the extreme oppression of men and boys involved in consensual sexual and other relationships with each other." DX D at 1.[4] Membership "is open to all individuals sympathetic to man/boy love in particular and sexual freedom in general." *Id.* Specifically, NAMBLA advocates, *inter alia*:

> abolition of age-of-consent and all other laws which prevent *men and boys* from freely enjoying their bodies

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4. "DX" refers to exhibits introduced by defendants.

> release of all convicted pedophiles
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> abolition of all laws which limit freedom of expression, including child pornography laws
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> support of all boys and men who voluntarily choose to participate in teenage hustling
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> opposition to all attempts by the state to interfere with consensual and non-coercive sexuality
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> replacement of existing age-of-consent laws with laws empowering children -- including the right to alternative home environments (such as homes operated by children), self-education (i.e., the option not to attend), and the right to conduct their sexual lives with no more restriction than adults

See id. (emphasis in original).

NAMBLA proposes achieving these goals by: "(1) building a support network for such men and boys; (2) educating the public on the benevolent nature of man/boy love; (3) cooperating with the lesbian, gay, and other movements for sexual liberation; (4) supporting the liberation of persons of all ages from sexual prejudice and oppression." *Id.*

A Steering Committee governs NAMBLA between general meetings of its members. The Steering Committee is comprised of at least twenty NAMBLA members drawn from local chapters, and meets at least every two months. The responsibilities of the Steering Committee include, inter alia, setting membership fees, calling general membership meetings,

expelling members for good cause, forming subcommittees for specific activities, voting on organizational matters between general membership meetings, directing the disbursement of funds, and appointing NAMBLA officers. NAMBLA officers include a treasurer, membership secretary, corresponding secretary, recording secretary and international secretary.

Melzer became a member of NAMBLA sometime in 1979 or 1980, and has served the organization in various capacities since that time. Melzer was a member of the group that facilitated drafting NAMBLA's position on child pornography. *See* Tr. at 4478-91. [5] It states:

> NAMBLA supports all voluntary, non-violent sexual activity. The depiction of such activity is not harmful, so long as those involved agree. NAMBLA calls for the abolition of all laws which limit freedom of expression, including child pornography laws.
>
> NAMBLA condemns those who exploit children and others for profit in pornography and demands just compensation and the full informed consent of those depicted in cases of the commercial distribution of erotica.
>
> NAMBLA condemns pornography which further racial and sexual stereotypes and oppression.

DX D at 6.

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[5] "Tr." refers to the transcript of testimony taken during the hearing.

Additionally, Melzer intermittently served as a member of the Steering Committee shortly after becoming a member, and as NAMBLA treasurer during the 1980's. *See* Tr. at 3809.[6] As early as 1982, Melzer was also actively participating in the organization by serving on the editorial staff of the *Bulletin*, known as the Collective. The *Bulletin* is a newsletter published by NAMBLA ten times a year, containing various articles relating to NAMBLA's goals. The Collective is responsible for determining the content of the *Bulletin*, and includes all NAMBLA members working for the *Bulletin*. All members of the Collective are listed on the *Bulletin* masthead, and have a voice in choosing articles for publication. *See* Tr. at 3968-69. Melzer, on occasion, exercised his right to veto articles. *See id.* The *Bulletin* is made available to NAMBLA members by direct mail, and is offered for sale to the public at various magazine and book stores. NAMBLA does not investigate whether subscriptions are purchased by children or adults; it will distribute the *Bulletin* to anyone who pays for it. *See* Tr. at 4554.

In the March-April 1982 issue of the Collective, Melzer expressed "disillusionment and disappointment" with NAMBLA's priorities and leadership. DX E at 5. As a result, Melzer resigned from the Steering Committee and the Collective by authoring an article entitled "Taking a Leave of Absence." *Id.* The article concluded, "were I fulfilled as a boy-lover, I would be much more at ease waiting for the millenium or working in an inefficient environment. Right now, personal priorities dictate that I get my own head together as a

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6. The record is somewhat unclear in regard to the exact date upon which Melzer joined the Steering Committee. Melzer testified that he was on the committee between 1984 and 1994; however, *Bulletin*'s from as early as 1982 show that Melzer was a member of the Steering Committee at that time. *Compare* Tr. at 3809 with DX E.

boy-lover. When and if that occurs, I hope to come in again with renewed vigor." *Id.*

However, by March 1983 Melzer again was appearing on the masthead as a member of the *Bulletin* Collective. In the December 1986 *Bulletin*, [7] Melzer authored an article entitled "Police Infiltrator." DX G. The article commented on the activities of Kevin Healy ("Healy"), a detective with the Manhattan South Public Morals Division of the New York City Police Department, who posed as a NAMBLA ally. Healy was reported by Melzer to be responsible for a "web of lies and coercion" that led to the arrest of a NAMBLA Steering Committee member. *Id.* In a continuation of the police infiltrator story in the January-February 1987 issue of the *Bulletin*, Melzer wrote that Healy preyed on vulnerable members of the organization and caused one of them to mail a file of "my *Bulletin* articles to my employer." DX H. Melzer stated in the article that he had given testimony at the trial of the NAMBLA member who was arrested, and he encouraged people to contribute to that person's defense fund because he was an important member of the NAMBLA community and "fought tirelessly to get NAMBLA recognized." *Id.* Melzer does not believe that an individual who has sex with an under-aged youth should go to jail. *See* Tr. at 4667. Furthermore, he believes that the laws criminalizing sexual acts with children "are not humane and many laws are applied in an inhumane way." Tr. at 4502.

In the June 1987 *Bulletin*, a letter by Melzer to the Editor of the New York Post was reprinted, wherein Melzer wrote that "NAMBLA believes that the ability to experience

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[7] There are no *Bulletin*s in evidence between March 1983 and December 1986.

sexual pleasure is a gift enjoyable by everyone regardless of age or sex and should be the right of everyone regardless of age or sex." DX I. Melzer further explained that although NAMBLA is opposed to child abuse, NAMBLA "[does] not accept the view that erotic acts involving young people are automatically abusive or exploitative." *Id.*

Sometime between August 1987 and October 1991, the *Bulletin* began incorporating a statement of "Where We Stand" in every publication. *See* DX K. [8] "Where We Stand" is a statement of NAMBLA's purpose, proclaiming: "we work to organize support for boys and men who have or desire consensual sexual and emotional relationships and to educate society on their positive nature. We speak out against the oppression endured by men and boys who love one another and support the right of all people to consensual intergenerational relationships." *Id.* Included in the October 1991 issue was a guide to "Staying Safe and Happy as a Man/Boy Lover." *Id.* The guidelines were "developed by NAMBLA activists." *Id.* Included in the guidelines was advice on how to survive in a culture hostile to NAMBLA. It explained, *inter alia*, how to deal with police, where to store erotica, how to keep specific information about the identity of your lover a secret; furthermore, it advised not to keep photos where police might find them, and never to discuss "the specifics of an illegal relationship with therapists or social workers." *Id.*

Melzer authored an article in the January-February 1992 *Bulletin* entitled "Thanks-and stay generous." DX L. The article

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[8] Again, there is a gap in the evidence, and the Court has no other information regarding publications during this time frame; furthermore, Melzer did not appear as a member of the Collective in the October 1991 issue.

acknowledged receipt of $ 1,000 in contributions, urged continued donations, and boasted that membership "became 1,000 strong for the first time in our history." *Id.* The March 1992 issue contained an article by Melzer entitled "Keeping Up the Barricades." DX M. It commented on the ability of some of NAMBLA's members to "present an image of strength to the hostile hordes," solicited further contributions, and noted that "our mission [is] steadfast. We are the good guys. We have prevailed for [almost] fourteen years, and with your help we will continue to do so." *Id.* A piece in the July-August 1992 *Bulletin* noted that Melzer was one of three NAMBLA representatives to attend the "6th annual International Pedophile and Youth Emancipation (IPCE) conference" in Amsterdam, Holland. DX O. "Much of the three-day meeting [was] used to share information about the situation for the boy-love/pedophile movement in the various countries represented." *Id.*

In November 1992, Melzer reappeared on the *Bulletin* masthead as a member of the Collective. Also included on the masthead, as in many other issues, was a statement that the [*Bulletin*] content "is determined by the *Bulletin* Collective, which includes all NAMBLA members working for the *Bulletin*." DX P. In the "Letters" section of the following issue, which again listed Melzer as a member of the Collective, an anonymous letter addressed to NAMBLA entitled "Good Touches" appeared. DX Q at 8. "Good Touches" explained how to "make that special boy feel good." *Id.* It made suggestions regarding specific body parts and how best to "rub" them. *Id.* It concluded that all the "suggestions are even better when done in a warm shower." *Id.* In general, Melzer believes that the "Letters" section of the *Bulletin* had "value." Tr. at 4351. With respect to this particular letter, Melzer considered it "humorous," as "a take-off on some of the . . . good touch, bad touch advice that . . . some professionals . . . go around to schools . . . tell[ing] youngsters [about]." Tr. at 4344.

In January-February 1993, the *Bulletin* included an article about "the 'missing children' hysteria," and characterized it as "little more than hype from self-serving bureaucratic child-savers." DX R. The issue also contained a "Letter to a Young Boy-Lover." *Id.* The letter purported to be a response to a letter from a "17-year old boy lover." *Id.* It gave advice about how to entice susceptible children into sexual acts. Although Melzer did not agree with the letter, he thought it was more beneficial than harmful because "most people reading this, even in that narrow audience would [not] take that advice. I think this is more of an emotional release just like being in a psychiatrist's chair." Tr. at 4540.

The June 1993 *Bulletin*, still listing Melzer as a member of the Collective, contained a letter entitled "In Praise of Penises." DX V. The letter celebrated oral sex with pre-adolescent boys. Melzer considered the letter to be merely an "emotional safety valve," an "outlet" for fantasies. Tr. at 4531. Melzer considered many of the articles published in the *Bulletin* to be such "emotional safety valve[s]." Tr. at 4352; *see also* Tr. at 4419.

III. *Relationship Between Melzer's NAMBLA Activities and His Teaching Responsibilities*

Melzer readily admits that he is a boy lover, and is attracted to boys up to the age of about 16. *See* Tr. at 3911, 4102, 4499. Nonetheless, the record does not contain any evidence that Melzer has ever engaged in a sexual relationship with someone under the legal age of consent-seventeen. [9]

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[9] In New York, a person is deemed incapable of consent if they are less than seventeen years old. N.Y. Penal Law § 130.05 (McKinney 2001).

Melzer acknowledges that teachers often figure prominently in students' lives as role models; "many youngsters latch on to an adult . . . and want to behave like him." Tr. at 3361. However, Melzer believes that taking an active role in NAMBLA does not compromise his high standard of conduct or character as a teacher; rather, it shows "intelligence and responsible behavior." Tr. at 4459. Melzer testified that he never spoke about his views on sexuality in the classroom, and that his students never asked what he did in his spare time, other than an occasional inquiry about vacations. Melzer does not believe that laws should be broken; given society today, he believes it is unhealthy for underage youths to engage in sexual acts with adults because the psychological and social repercussions would be great. When asked to square this with his belief in NAMBLA's goals, Melzer was evasive; he continually digressed into rambling, non-responsive replies. When pressed, Melzer explained that he interpreted NAMBLA's stated purpose to mean that "theoretically it is possible for youngsters below the age of consent in certain localities to be able to, you know, that this would be all right." Tr. at 3816. He further testified that a sexual relationship with a child is "not necessarily" harmful. Tr. at 4503.

Dr. Fred S. Berlin ("Dr. Berlin"), a licensed psychologist, appeared as an expert on Melzer's behalf and testified that Melzer would not personally be sexual with a youngster, regardless of his association with NAMBLA, because he is cognizant that in "American society in 1996 for a variety of reasons that children are at risk of being harmed." Tr. at 2467. Dr. Berlin did not believe Melzer posed a threat to the students; he opined that there is no evidence "that a given student is likely to be so traumatized by this that it would impair them and cause them significant problems." Tr. at 2516-17.

Dr. Donald J. Lewittes ("Dr. Lewittes"), also a licensed psychologist, testified on behalf of the BOE and concluded otherwise. He opined that student knowledge of Melzer's affiliation and activities with NAMBLA

> would be an extremely anxiety provoking and disruptive experience for the average child and adolescent to be subjected to in a relationship where they have less power, that is, as a student, where they are assigned, where they have no right of option themselves to control their destiny, where they are highly dependent upon this person to perform acts such as teaching and grading which involves their future and specifically having to do with the sexual identity and development of adolescents, the feelings engendered by knowing that an authority figure has encouraged the disavowal or disruption of legal and moral codes that their families and the general community hold. These all would affect my opinion in relating that these children would react with anxiety, with fear and in my opinion, the average adolescents in that situation would have strong feelings about being assigned to an authority teacher.

Tr. at 1747-48.

Also relevant to Melzer's role as a teacher was his obligation, pursuant to a BOE resolution, to report to the Office of the Deputy Commissioner of Investigation ("DCI") "any and all information concerning corrupt or other criminal conduct, conflicts of interest, unethical conduct, or misconduct by officers or employees of the City School District of the City of

New York or by persons dealing with the City School District." DX HH. Failure to do so would be cause for removal. In addition, Melzer was obligated, pursuant to Chancellor's Regulation A-750, to report to DCI any information he might receive regarding sexual misconduct involving students, by anyone, at any time, whether on or off school premises. The Regulation provides that "sexual relationships with students are prohibited, regardless of a student's age." *Id.*

When asked to reconcile the inherent conflict between his reporting responsibilities and NAMBLA's stated goals, Melzer responded as follows:

> Q: I am asking you if in a NAMBLA meeting someone . . . admitted to having sex with an underaged youth identified by name would you report that person to the authorities?
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> A: If the way it was described in an unlikely set of circumstances someone insisted and said I do not care and gave the name, address and all that yes, they have no choice.
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> Q: What if the person admitted to having a sexual relationship with an underaged youth but did not provide the name, address and whatever other particulars you referred to, what would you do?
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> A: From my point of view it would be too vague. I would tell them to cease and desist, you are on very dangerous ground. You may be fantasizing, you may not be. I would point out the potential harm that he is causing and point out to him that, you know, there is a strong

likelihood that I would report it.

Q: Have you ever reported anyone who is a member of NAMBLA to the authorities for any reason?

A: No, that situation never occurred.

Q: You would view your reporting that person an [sic] inconsistent with NAMBLA's stated goals, providing support to people who are in man/boy love relationships?

A: It would be a very difficult conflict but, you know, as a teacher I think I have more of a - what is the word, loyalty to teaching than to NAMBLA.

Tr. at 4531-32 (emphasis added).

IV. *Investigation and Repercussions*

Melzer's membership in NAMBLA was first disclosed to a limited number of BHSS and BOE officials in 1984-85 when an anonymous letter was sent to then-BHSS principal Milton Koppelman. An interview was conducted by the BOE's Office of the Inspector- General ("OIG") on March 29, 1985, during which Melzer declined to confirm whether he was a member of NAMBLA. No administrative action was taken against Melzer at that time.

The investigation into Melzer's NAMBLA membership was reopened in May, 1992 by the Office of the Special Commissioner of Investigation for the New York City School

District ("SCI"). The SCI was established in 1990 by mayoral executive order, and is responsible for the "investigation of corruption, conflicts of interest, unethical conduct and other misconduct within the school district of the City of New York." PX 15 (attaching Executive Order No. 11 from the Office of the Mayor, David Dinkins (June 28, 1990)).[10] The SCI reopened the Melzer investigation because it was an unresolved case left over from its predecessor entity, the OIG. Sean Courtney ("Courtney"), Special Counsel to Special Commissioner Edward F. Stancik ("Stancik"), was assigned the task of reviewing the files relating to Melzer and determining if further action was warranted.

While Courtney's investigation was ongoing, WNBC-TV Channel 4 aired a three-part news story by investigative reporter John Miller ("Miller") on March 2, 3 and 5, 1993. The news story identified Melzer as a physics teacher at BHSS and an active member of NAMBLA. The story included excerpts from a secretly taped meeting of the New York City chapter of NAMBLA at which Melzer was shown advising a non-tenured employee of the BOE to lay low regarding his NAMBLA affiliation and activities until he became tenured. Miller also was seen interviewing BHSS students and attempting to interview Melzer. Soon thereafter other print and electronic news media picked up the story and further disseminated Melzer's name and image, along with his position at BHSS and his NAMBLA membership.

After the NBC story aired, the BHSS community was rampant with discussions of Melzer. In response, then-BHSS principal Vincent Galasso ("Galasso") convened his cabinet- a group of approximately ten individuals, including the Chairman

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[10] Hereinafter, "PX" refers to Plaintiff's exhibits.

of the Academic Department, the Assistant Principal for Pupil/Personnel Services, and the Assistant Principal for Administration. The cabinet discussed its concerns regarding the publicity generated by the news story, the possible effect of the news story on recruitment, and whether Melzer should be teaching children. Galasso also spoke with approximately 75-100 teachers, the majority of whom agreed with the concerns of Galasso's cabinet, and believed that Melzer should not return to the classroom.

A meeting of the BHSS Parents' Association ("PA") was held on March 3, 1993, right after the first part of the NBC news story aired. At the meeting, attended by Galasso and approximately 300 parents, many parents expressed anger over Melzer's NAMBLA affiliation and stated that they would do whatever necessary to prevent Melzer's return to the classroom, including picketing, removing their children from BHSS, and urging other parents to do the same. At the conclusion of the meeting, a committee was appointed to draft a letter to the Chancellor, Joseph Fernandez, the Mayor, and other public officials, which would be reviewed, and was approved, at an emergency meeting the following week. The letter demanded a meeting with the Chancellor and requested, among other things, that "neither Mr. Melzer nor any other known member of NAMBLA [] be in a position of daily sanctioned contact with the children of the Bronx High School of Science, or of any other school within the New York City public school system." DX DD. The requested meeting was convened towards the end of March 1993. At the meeting, parents told Chancellor Fernandez that they did not want Melzer to return to the classroom, and that they would boycott BHSS and bring in the news media if he returned.

On or about March 11, 1993, Student Organization President Ghihee Su and the Student Organization Cabinet

distributed a notice announcing two student meetings to be held in the BHSS auditorium, scheduled for the first and ninth periods the following day, to discuss the Channel 4 news story. Galasso, who was invited to attend the meetings, stated that their purpose was to "let the students know what the student leaders knew and to get response from the kids to see how they felt about the issue." Tr. at 172. Approximately 300-400 students attended the first period meeting. Of approximately 30-40 student speakers, the majority spoke against Melzer's return to the classroom. At the second meeting, of approximately 50-100 students in attendance, twenty students spoke, and again the majority of speakers were against returning Melzer to the classroom. According to Galasso, "some students were quite blunt about their feelings" that they "would not want to be in a classroom with somebody who had those kinds of - that kind of value system that they could advocate adults having sex with young boys. The notion was expressed that it would be hard to concentrate in a classroom if you knew the teacher was - belonged to an organization and might be having thoughts about - that were not appropriate." Tr. at 199-200. Galasso concluded that "a very, very large majority of the students felt negatively towards the concept of NAMBLA, the ideals that they espoused, and that they would not - - they were not happy that Mr. Melzer was associated with that group and they would not be happy to have him back." Tr. at 181. A few dissenters at each meeting expressed the opinion that "a person who was not convicted of doing something should be allowed to practice their business, their trade, their profession." Tr. at 177.

In addition, Galasso spoke informally with several hundred students in the hallways or while passing through the cafeteria. *See* Tr. at 183. Galasso heard some students express disgust, whereas others wanted to know if Melzer was "going to be allowed back into the school?" Tr. at 183. Other students

went so far as to be "graphic about the kind of sex that men and boys might have," and indicated their repulsion to such a notion. Tr. at 200. Another concern that students expressed was "reluctance to approach Mr. Melzer after class" to discuss the course material, either because their peers would inappropriately speculate as to the reason for such an after-class meeting or "a student might . . . be teased." Tr. at 200-01. Based on these conversations, Galasso believed it was "very, very clear [that] the majority of the number of kids" did not want Melzer to return to the classroom; "well over 90 percent . . . were unhappy with NAMBLA and Mr. Melzer's association." Tr. at 183. In Galasso's opinion, if a student is "thinking about something that is repugnant to them, it might make it more difficult for them to learn the physics that they are supposed to be learning." Tr. at 200.

School publications ran articles concerning the controversy over Melzer's NAMBLA activities. The articles presented viewpoints of the students and attempted to present both sides of the issue. One article discussed the pros and cons, expressing the pros as "no matter how strange a lifestyle might appear, our society gives people the right to express their views," and the cons as "he should . . . be condemned . . . for his actions, which I believe are utterly detestable." PX 5.

Undaunted by the public reaction regarding his NAMBLA membership, Melzer authored an article for the June 1993 *Bulletin* entitled "Outed on NBC." DX V. The article addressed the NBC expose. Melzer stated that he "had never hidden [his] participation in NAMBLA since [he] wrote *Bulletin* articles under [his] own name and openly marched under NAMBLA's banner." *Id.* Furthermore, he noted that were he "not currently on sabbatical leave" he would surely be suspended from the school; the NBC story "caused a major stir" at BHSS and he expected "very significant developments to

follow from this." *Id.* Melzer concluded, "for my part, despite ominous threats to my career, I have no regrets. I have always been aware of the remote possibility of this happening. I am fully prepared for the struggle to come." *Id.*

Based on his conversations with teachers, students and parents, Galasso believed that Melzer could not successfully return to the classroom because the majority of the people he spoke with were "firmly opposed to [NAMBLA's] views and beliefs, that it is detrimental to the educational process, that the parents would not allow the school to operate if a person who has those opinions were in the school building and that many of the students would, in fact, opt not to report to a class if they were assigned to a man who had those opinions." Tr. at 216-17. In addition, Galasso believed that picketing would be particularly troublesome because many students might not want to cross a picket line. In his opinion, lack of attendance, in addition to impeding the learning process, would create public relations problems by attracting further negative attention to the school. Moreover, according to Galasso, "people have to apply to come into the school, they have to travel long distances a lot of times and it would not be an incentive for people to do that if they felt that the atmosphere in the school was chaotic," thereby reducing the number of applicants to the school and consequently diminishing the school's competitive edge. Tr. at 209.

The testimony of Nicholas deJesus,[11] then Bronx Superintendent of High Schools, echoed Galasso's concerns. He believed that returning Melzer to the classroom was inappropriate because there was a "significant sense of lack of

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[11] Inexplicably, this individual is named "Joseph deJesus" in the caption of the complaint.

trust and ability to properly protect the interests of students, "Tr. at 2282, there was concern for the school's reputation, concern that Melzer could not fulfill his reporting obligations, concern whether students would attend Melzer's classes, and concerns about the threatened protests, boycotts and walkouts. DeJesus concluded that reassigning Melzer's students and addressing the concerns of the community would pose an immediate, significant threat to the otherwise smooth and efficient operations of the school. *See* Tr. at 2282. Consequently, sometime during the Spring semester of 1993, deJesus informed Melzer that he would not be permitted to return to the classroom in the fall, after his sabbatical leave expired. Pending the result of the SCI investigation and action by the BOE, deJesus reassigned Melzer "to non-school offices." *See* Tr. at 2320-21.

V. *The BOE Action and Dismissal*

In September 1993, Courtney issued a report on behalf of the SCI entitled "An Investigation into Misconduct Relating to Pedophilia by Peter Melzer, a Teacher at the Bronx High School of Science" (the "Report"). DX BB. The Report noted that "because of the special status of Bronx Science in the school system and the high level of commitment and organization by the parents of its students, it seems clear that parents and students will stay and fight for Melzer's removal or, at the very least, for Melzer's removal from unsupervised contact with students. For its part, the school system will have no practical choice but to comply sooner or later with parents' requests to re-assign their children from Melzer to other teachers. It is impossible to believe that school officials would seek to have boycotters declared truant and then to obtain court orders to compel them to attend Melzer's classes." *Id.* at 26.

In conclusion, the Report recommended

that the Board of Education impose severe disciplinary action against Mr. Melzer, which could appropriately include termination of employment. At a minimum, disciplinary action should include the complete and permanent removal from unsupervised contact with students. He should not be returned to the classroom. . . Even if one does not consider Melzer a risk to sexually abuse his students, his misconduct in aiding the *Bulletin* in publishing the advisories for pedophiles [] makes him unfit to teach children. Articles advising pedophiles to use sexual jokes and pornography to identify sexually curious youngsters are hardly academic musings. Indeed, such articles could serve as an instruction manual in the sexual abuse of children and can reasonably be assumed to have led to such abuse. A person who would willingly aid such a venture should not be entrusted with the care of children. . . We have examined the constitutional issues involved here, and feel the Board is entitled to take Melzer's advocacy of these forms of child abuse into account in evaluating his fitness to teach. Further, Bronx Science has an undeniable interest in the smooth operation of its educational activities. This operation has already been disrupted through Melzer's misconduct. Bronx Science has an excellent history and reputation which have led to extraordinary confidence on the part of parents in the school's ability to provide a sound education. That confidence has been at least

> temporarily disrupted by Melzer and his activities. Additional and more serious disruption, as well as a permanent diminishment of parental confidence, seems inevitable if Melzer is returned to the classroom.

Id. at 45-46.

Following receipt and consideration of the Report, the BOE preferred charges against Melzer, unanimously finding that probable cause existed to undertake disciplinary proceedings, including possible termination. *See* DX B.[12] The charges specified that Melzer

> advanced the goals and activities of NAMBLA, and assisted in the publication of the NAMBLA *Bulletin*, including at times editing, writing and raising funds for this publication, all of which promoted illegal sexual activity between male adults and male children under the age of consent, an activity proscribed by Article 130 of the New York Penal Law. During portions of this period, [Melzer] was listed on the masthead of the NAMBLA *Bulletin* and occupied an important position in this organization. [Melzer's] activities on behalf of NAMBLA have been widely reported, and have caused disruption in his school and the school community, and undermine his ability to serve

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[12]. The charges were preferred on September 22, 1993, and amended on October 20, 1993. Substantively, the amended charges do not differ from the original charges. *Compare DX A with DX B.*

as a teacher.

DX B. The BOE informed Melzer of his right, pursuant to New York Education Law § 3020-a, to request a hearing before a three-member panel or a single hearing officer, to contest the charges. Melzer chose the latter.

VII. *The Hearing*

The hearing began on November 9, 1994. Thirty-three days of hearings took place over the course of the next three years, concluding on May 5, 1997. On April 22, 2000, in a carefully considered and reasoned 93-page opinion and award, the hearing officer sustained the BOE's charges and determined that Melzer should be terminated. The standard of review applied by the hearing officer was whether the BOE had "establish[ed] a nexus between the conduct and one or more legitimate interests of the [BOE]." Melzer Opinion and Award at 39. The hearing officer considered whether the BOE had established that Melzer's "off-duty conduct either 'directly affect[ed] the performance of the professional responsibilities of the teacher, or if without contribution on the part of the school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capacity of the particular teacher to discharge the responsibilities of his position.'" *Id.* at 39-40. (quoting *Matter of Goldin v. Board of Education*, 35 N.Y.2d 534, 364 N.Y.S.2d 440, 324 N.E.2d 106 (1974)). In applying this standard, the hearing officer found it unnecessary to "engage in any kind of extensive analysis of the First Amendment in resolving the central issues in this [case]," *id.* at 76, as "proper application of" the nexus/legitimate interests test "is a standard of review that takes into account the First Amendment." *Id.* at 77. The hearing officer reasoned that:

[Melzer's] off-duty conduct, particularly in his position as a member of the NAMBLA *Bulletin* Collective, has created the reasonable appearance that [Melzer] has approved material that endorses and possibly promotes actual sexual activity between men and boys in violation of the New York State Penal Law. It is this characterization of [Melzer's] off-duty conduct that allows the analysis to proceed. If [Melzer's] association with NAMBLA and the reasonable perceptions created thereby could not support this characterization, this Arbitrator has serious doubt that the First Amendment would permit the [BOE] to impose discipline upon [Melzer] notwithstanding the strength of parental and student opposition to [Melzer's] return to the classroom.

The [BOE] has shown the existence of legitimate interests harmed by the above characterization of [Melzer's] off-duty conduct. As the findings above state, [Melzer's] association with NAMBLA and the reasonable perceptions thereof have and will predictably cause significant disruption to the [BOE's] ability to deliver a valid educational experience to the students at BHSS. Moreover, [Melzer's] ambivalence about the need for age of consent laws coupled with his acknowledgment of a very difficult conflict between his NAMBLA membership and his duty to report child abuse, in this Arbitrator's estimation, independent of perceptions, has allowed the [BOE] to posit a valid reason why it has substantial concerns of its own right regarding [Melzer's] return to the classroom.

Id. at 88-91 (internal quotation marks omitted). [13]

DISCUSSION

Melzer argues that his "participation in NAMBLA and publication of the NAMBLA *Bulletin* was expression on public issues and therefore on the highest rung of the hierarchy of First Amendment value." Pl.'s Mem. Law at 8. He claims that he was terminated in retaliation for his expressions, which were "unrelated to his job and spoken outside the employment context;" therefore, the employment action was unconstitutional. *Id.* at 8-9.

Defendants contend that Melzer's First Amendment claim should be dismissed because Melzer's expressions did not touch on a matter of public concern. In the alternative, they argue that their "interests in preserving the [BOE's] educational mission, and in providing parents and students with teachers in whose judgment they can reasonably rely, far outweigh [Melzer's] limited interest in speaking upon matters far removed from educational policy, and in which the public has no interest." Def. Mem. Law at 77.

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[13]. If the hearing officer be likened to an arbitrator, the Court ordinarily could afford his determination whatever weight it deemed appropriate. *See McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 292 n.13, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984). Where, however, constitutional issues are implicated, federal district and appellate courts are each obliged to make an independent assessment of the factual record. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 648-49, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) ("Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obliged to undertake an independent review of the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression.").

I

More than three decades have passed since the Supreme Court announced in *Pickering* that to determine whether public employers violate the First Amendment by disciplining their employees for their speech requires "arriving at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." *Pickering v. Board of Educ. of Township High School Dist.* 205, *Will Cty.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). The rationale for the need to discern whether the employee's speech be upon a matter of public concern, as subsequently explained in *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), is that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. The so-called "public concern" doctrine has consequently evolved as the threshold question of constitutional law regarding matters of speech in or about the workplace prior to the application of a Pickering balance. *See Knight v. Connecticut Dep't of Public Health*, 275 F.3d 156, 164 (2d Cir. 2001) ("If the public employee speech does not touch on a matter of public concern, it is not entitled to First Amendment protection; if, however, it does touch upon a matter of public concern, we must balance the interests of the employer in providing 'effective and efficient' public services."); *Lewis v. Cowen,* 165 F.3d 154, 161 (2d Cir. 1999) ("In determining whether employee speech is protected by the First Amendment, a court first must decide whether the speech addresses a matter of public concern.").

In *Knight*, the Second Circuit recently synthesized the standard that has developed as a consequence of *Pickering* and *Connick* in arriving at a proper *Pickering* balance:

> [The Court] must consider whether the statement sought to be protected impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. Further, the more the employee's job requires confidentiality, policy-making, or public contact, the greater the state's interest in firing her for expression that offends her employer. Also important is the manner, time, and place of the speech. While the burden of proof lies with the government, the State need show only a likely interference with its operations, and not an actual disruption.

Id. (internal citations and quotations omitted).

Thus, the government can discipline an employee for speaking on a matter of public concern "if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech." *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998) (internal citations omitted). From the employee's perspective, the public employer will be liable if it disciplined the employee "in retaliation for the speech, rather than out of fear of . . . disruption." *Lewis*, 165 F.3d at 163. This means that the employee must establish that

"the speech was a substantial or motivating factor in the adverse employment action." *Id.* 165 F.3d at 162. Nonetheless, "even if there is evidence that the adverse employment action was motivated in part by protected speech, the government can avoid liability if it can show that it would have taken the same adverse action in the absence of the protected speech." *Heil*, 147 F.3d at 110; see also *Locurto v. Safir*, 264 F.3d 154, 166 (2d Cir. 2001).

II

In its application of *Pickering*, the Second Circuit has invariably been confronted with cases involving speech by public employees on matters of public concern at or about the governmental workplace, *see, e.g., Knight*, 275 F.3d at 160 (proselytizing at hospital while working with patients); *Hale v. Mann*, 219 F.3d 61, 64-66 (2d Cir. 2000) (adoption and transmittal of report critical of employer's policies); *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130, 133 (2d Cir. 1999) (contacting OTB Inspector General about problems at OTB); *Lewis,* 165 F.3d at 157 (voicing objections to new lottery policies to Connecticut Gaming Policy Board); *Clue v. Johnson*, 179 F.3d 57, 59 (2d Cir. 1999) (criticism of management's labor policies by union faction); *McEvoy v. Spencer*, 124 F.3d 92, 95-96 (2d Cir. 1997)(Police Commissioner's criticism of police department); *Sheppard v. Beerman*, 94 F.3d 823, 826 (2d Cir. 1996) (law clerk's criticism of judge); *Jeffries v. Harleston*, 21 F.3d 1238, 1241 (2d Cir. 1994), *rev'd on remand*, 52 F.3d 9 (2d Cir. 1995) (derogatory statements about Jews during off-campus address by chairman of college Black Studies department concerning bias of public school curriculum and history of black oppression); *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149, 1151 (2d Cir. 1991) (job-related testimony before governmental committee), cases where there existed job-related personnel

matters falling under Connick's proscription, *see, e.g. Ezekwo v. NYC Health & Hospitals Corporation*, 940 F.2d 775 (2d Cir. 1991) (resident doctor's complaints aimed at protecting his reputation and individual development), or cases where there existed an independent basis for the discipline unrelated to the protected speech. *See, e.g., Heil*, 147 F.3d 103 (hindering lawful investigation into dissemination of confidential material cause for discipline even if speech be deemed protected); *Blum v. Schlegel*, 18 F.3d 1005, 1013 (2d Cir. 1994) (denial of tenure unrelated to professor's advocacy in campus publications of legalization of marijuana and criticism of national drug policy); *Selzer v. Fleisher*, 629 F.2d 809, 812 (2d Cir. 1980) (remanding for new trial because of failure to charge jury whether tenure would have been denied regardless of professor's CIA involvement).

In the present case, the Court concludes that Melzer was terminated solely because his employer reasonably believed that the public exposure of his associational activities outside of the workplace as a member of NAMBLA was likely to impair Melzer's effectiveness as a teacher and cause internal disruption if he were returned to the classroom. Given this conclusion, conceptual analysis does not fit neatly within the paradigmatic factual pattern out of which the *Pickering/Connick* test has developed, and which has to date been the focus of Second Circuit precedent. In that pattern, "employee speech has invariably involved some form of criticism or questioning of the public employer's policy, or of its specific actions, or of supervisory personnel expressed either privately to the employer or publicly," thereby creating "the clash of public employee and public employer interests in employee speech rights in its most direct and easily identified form: the employee's right to criticize or disagree with governmental operations versus the governmental interest in avoiding the internally disruptive effect of the very criticism or

disagreement." *Berger v. Battaglia*, 779 F.2d 992, 997 (4th Cir. 1985). How then should the court evaluate those situations, such as the present case, falling outside of the paradigmatic *Pickering/Connick* fact pattern?

To begin, although the Supreme Court has recognized, true to that paradigm, that cases involving application of the *Pickering* balancing test "usually have involved" disciplinary actions taken in response to an employee's "job-related speech" on matters of public concern, *United States v. National Treasury Employees Union*, 513 U.S. 454, 465-466, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995), it has also recognized that its application is not limited to speech on matters of public concern at or about work; rather, *Pickering* balancing is triggered whenever a public employee's expressions on matters of public concern are sought to be circumscribed by governmental interdiction. Thus, in *Rankin v. McPherson*, 483 U.S. 378, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987), the Court "directly applied the *Pickering* balance to speech [on a matter of public concern] whose content had nothing to do with the workplace," *National Treasury*, 513 U.S. at 466, n.10, although it occurred in the workplace,[14] and in *National Treasury*, in striking down a section of the Ethics in Government Act prohibiting the receipt of honoraria by government employees, the Court directly applied *Pickering* balancing in assessing comment by government employees on matters of public concern regarding compensated speeches and articles "addressed to a public audience [which] were made outside the workplace, and involved content largely unrelated to their government employment." *Id.* at 466. This view of *Pickering* is in keeping within "the precedents in which *Pickering* is rooted,

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[14] In *National Treasury*, the Court noted in that footnote, however, that *Rankin* was "the only case" of that nature. 513 U.S. at 466, n. 10.

the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs;" the issue in such cases being "whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive'." *Connick*, 461 U.S. at 144-45. Second Circuit precedent recognizes this broad-based principle. *See, e.g., Bieluch v. Sullivan*, 999 F.2d 666 (2d Cir. 1993) (applying *Pickering* balancing to speech on matters of public concern in the course of political community activities unrelated to job); *James v. Board of Educ. of Central District No. 1, Addision*, 461 F.2d 566 (2d Cir. 1972) (applying *Pickering* balancing to symbolic wearing of black armband by teacher in school to protest Vietnam War).

Melzer has joined an association that expresses views and aspirations clearly repugnant to the sensibilities and belief systems of the community at large, the Court and his public employer. Nonetheless, Melzer's right to join this expressive association as a citizen, regardless of its views, and to participate in its activities, is protected by the Constitution.

Initially, freedom of association sweeps broadly. See *NAACP v. Alabama*, 357 U.S. 449, 460, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958) ("Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured" by the First Amendment, and is "undeniably enhanced by group association"); *Healy v. James*, 408 U.S. 169, 180, 33 L. Ed. 2d 266, 92 S. Ct. 2338 (1972) ("While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition."); *Boy Scouts*, 530 U.S. at 647 (no matter how unpopular, "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide

variety of political, social, economic, educational, religious and cultural ends") (internal citation and quotation marks omitted). Second, while constitutional protection will not be accorded to advocacy that is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," *Healy*, 408 U.S. at 188 (internal citation and quotation omitted), a member of such group cannot be punished unless there is "clear proof that [he] 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence.'" *Scales v. United States*, 367 U.S. 203, 229, 6 L. Ed. 2d 782, 81 S. Ct. 1469 (1961) (quoting *Noto v. United States*, 367 U.S. 290, 299, 6 L. Ed. 2d 836, 81 S. Ct. 1517 (1961)). Therefore, imprecise advocacy or encouragement is not enough: "advocating 'illegal action at some indefinite future time' is protected." *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 244 F.3d 1007, 1015 (9th Cir. 2000) (quoting *Hess v. Indiana*, 414 U.S. 105, 108, 38 L. Ed. 2d 303, 94 S. Ct. 326 (1973)). There is nothing in the record before the Court to allow it to conclude that Melzer has engaged in illicit, proscribed conduct.

Nonetheless, just as in pure speech cases, Melzer's associational rights must also be viewed through the prism of his status as a public employee since the precedents forming the conceptual footings to *Pickering* make clear that *Pickering* cannot logically be read as invoking the need to balance the respective interests of the public employee and his employer only in pure First Amendment job-related speech cases. *See Selzer*, 629 F.2d at 815 (Kaufman, J., concurring in part and dissenting in part) ("the right to associate freely is not absolute, particularly when its exercise conflicts with the duties and responsibilities of a governmental employer"). What is less clear is the need for public concern analysis when the protected activity does not implicate speech at or about the workplace.

For example, the Second Circuit has recognized that "it is anything but clear whether the public concern requirement applies to associational claims made by government employees," noting that "some courts have read *Connick* to say that a public concern must also be raised for government employees to state a First Amendment *associational* claim, while others have refused to apply the public concern requirement beyond the category of speech." *Clue*, 179 F.3d at 61 n.2 (citing cases).

> The debate has aptly been framed by one commentator as follows:
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> The courts holding that the Connick threshold test does apply to associational claims rely on one or more of the following three rationales for their holdings. First, these courts note that even though Connick and Pickering involved speech claims, an underlying issue in these cases was "whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties or other associations that certain public officials might find subversive." Next, these courts contend that no logical reason exists to differentiate between speech and association. Finally, they argue that one First Amendment freedom should not be elevated above another, and, therefore, associational rights should not be exempt from the Connick test.
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> * * *
>
> The courts ruling that associational claims are exempt from the Connick test set forth two

> arguments: First, they point out that Connick involved only speech and did not raise associational claims. Second, and perhaps more importantly, these courts contend that they must respect the broad definition of protected associational activity established by the Supreme Court in NAACP v. Alabama ex rel. Patterson, and that Connick should not infringe upon that broad protection.

Paul Cerkvenik, Note, *Who Your Friends Are Could Get You Fired! The Connick "Public Concern" Test Unjustifiably Restricts Public Employees' Associational Rights*, 79 Minn. L. Rev. 425, 427-28 (Dec. 1994); *see also of comparable effect*, Mark Strauss, Note, *Public Employees' Freedom of Association: Should Connick v. Myers' Speech-Based Public-Concern Rule Apply?*, 61 Fordham L. Rev. 473, 475 (Nov. 1992). Suggested resolutions range from eschewing the Connick threshold public concern test regarding associational activities of public employees in favor of focusing exclusively on the *Pickering* balancing test, since that framework "preserves the Supreme Court's original broad view of the right of freedom of association while protecting the government's ability as an employer to deliver public services efficiently," Cerkvenik, 79 Minn. L. Rev. 425 at 450, to prescinding between expressive and intimate associations. Strauss, 61 Fordham L. Rev. 473 at 480-82. In this latter regard, it is reasoned that "Connick's public-concern rule should be applied to claims based on the right of expressive association because this right exists as an instrument or means of enhancing freedom of speech," but "Connick's public-concern rule should not be applied to those claims based on the right of intimate association, because this constitutionally recognized right, by definition, protects associations of highly personal interest." *Id.*

61 Fordham L. Rev. 473 at 495.

The Second Circuit in *Clue* has given a clue on its take on the issue, commenting in footnote *dicta* that "the most sophisticated opinion on this question carefully distinguishes between 'hybrid free' speech/free association claims, to which it believes the public concern requirement should apply, and pure free association claims, to which it concludes the public concern does not and ought not to apply." 179 F.3d at 61 n.2 (citing to concurring opinion of Cudahy, J. in *Balton v. City of Milwaukee*, 133 F.3d 1036, 1041 (7th Cir. 1998)). As explained by Judge Cudahy in *Balton*, "*Pickering* and *Connick* do not supply a relevant test for purely associational claims because such cases generally do not involve interference with the work relationship. This sharply contrasts with speech cases, or the hybrid speech/association cases cited by the majority," *Balton*, 133 F.3d at 1041, where the "content, form, and context of a given statement," which is the touchstone of public concern analysis, can invariably be discerned. *Id.* (internal quotation marks and citation omitted).

It is difficult to ascertain from *Clue* or *Bolton* in this undeveloped area of First Amendment jurisprudence precisely what is meant by a pure associational claim as contrasted to a hybrid speech/association claim, especially when dealing with expressive associations, which by their very nature invariably entail speech on matters of public concern. The case Judge Cudahy relies upon in *Balton* as the analytic basis for determining when a court should "ignore[] any question of public concern," 133 F.3d at 1041, is instructive, but hardly a blueprint of analytic clarity. In that case, *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968), addressing the issue of when a school district could dismiss a teacher for associational union activities, the court, while relying on *Pickering*, made no mention of the issue of public concern, as pointed out by Judge

Cudahy in *Balton*. Instead, it simply noted, in finding the complaint to state a claim in the face of a motion to dismiss, that "even if the record disclosed that the union was connected with unlawful activity," that fact would "not justify charging members with their organization's misdeeds," reasoning that "[a] contrary rule would bite more deeply into associational freedom than is necessary to achieve legitimate state interests, thereby violating the First Amendment." *McLaughlin*, 398 F.2d at 289. The court noted, however, that "it is possible of course that at some future time plaintiffs may engage in union-related conduct justifying their dismissal." *Id.*

The only Second Circuit case addressing a hybrid speech claim is *Knight,* where the employees were disciplined for proselytizing while engaged in their work. In responding to the employees' contention that "theirs are hybrid claims, implicating both free speech and free exercise rights, and requiring a strict scrutiny analysis rather than analysis under *Pickering*," 275 F.3d at 166, the court recognized that "we have not yet addressed generally whether hybrid claims require a greater governmental justification than each component of the hybrid claim taken separately." *Id.* 275 F.3d at 167. Regardless, it considered the issue irrelevant "due to the state's significant interest in regulating the expressive conduct of its employees while they are acting on behalf of the state." *Id.* It consequently applied the *Pickering* balancing test, assuming arguendo, in apparent deference to the ritualistic public concern gate-keeping threshold, "that the religious speech at issue touched on a matter of public concern," *id.* 275 F.3d at 164, reasoning:

> The allegation that a state action that regulates public conduct infringes more than one of a public employee's constitutional rights does not warrant more heightened scrutiny than each claim would warrant when viewed separately. In

> both situations, the employer's interest remains the same and is entitled to the same weight in the constitutional balance.

Id. 275 F.3d at 167.

While it may well be that the employer's interest may remain the same regardless of the categorization of the employee's constitutional rights, it surely cannot be the case that the Second Circuit is suggesting in *Knight* that appropriate balancing can take place without considering and accounting for the nature and depth of the employee's constitutional rights. If so, *Pickering* balancing would invariably be unbalanced. *See Blum*, 18 F.3d at 1011 ("to determine the appropriate balance a court should consider both the nature of the [protected activity] and the nature of the services performed by the employee").

It may well be that the time is fast approaching, as indicated by the ever-mounting juridical discourse over the place of public concern analysis in the context of associational rights, when the courts should recognize that preoccupation with the public concern dogma birthed by Pickering and nurtured by *Connick* has obfuscated the singular need to simply identify in each case the underlying constitutional right of the public employee, of whatever stripe, that clashes with the employer's legitimate interest in promoting the efficiency of its public mission, as the sole predicate to Pickering balancing. To be sure, the concept of "public concern" always retains its intended utility as a threshold issue whenever the employee speaks as an employee in or about the workplace in assessing whether the speech truly is of constitutional magnitude or simply a personnel grievance.

This straightforward approach finds conceptual support

in the Tenth Circuit's decision in *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), involving disciplinary action against police officers for their part ownership in a video rental store which had amongst its inventory sexually explicit films. Mindful that the *Connick* public concern test was "intended to weed out speech by an employee speaking *as* an employee upon matters of personal interest," *id.* at 1564, the court reasoned that where the employee is not raising a personal grievance, such as in cases, like *Flanagan*, "involving employee nonverbal expression which is not at work nor about work[,] . . .it makes little sense to ask whether this speech is of public concern." *Id.* 890 F.2d at 1565. The court in *Flanagan* reasoned that Pickering balancing consequently should be directly invoked simply because the plaintiffs were engaged in "clearly protected expression under the first amendment." *Id.* ("Sexually explicit films and the distribution of sexually explicit films have consistently been upheld as protected under the first amendment whether under the free speech or free press clauses."); see also *National Treasury*, 513 U.S. at 480 (O'Connor, J., concurring in part and dissenting in part) (recognizing no need for public concern test prior to *Pickering* balance "to off-hour speech bearing no nexus to Government employment--speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee"); *Tindle v. Caudell*, 56 F.3d 966, 970 (8th Cir. 1995) (factually distinguishing case from holding in *Flanagan* that "public concern test does not fit cases involving employee whose expression did not take place at work and was not about work.").

Flanagan also cautions against giving credence to the so-called "heckler's veto" in the balancing process, finding there that the government's evidence "pointed only to potential problems which might be caused by the public's reaction to plaintiffs' speech," rather than evidence "of actual or potential

internal disruption" caused by the speech. 890 F.2d at 1566-67. In that regard, the court noted that the Supreme Court's frequent rejection of the heckler's veto "as a justification for curtailing offensive speech in order to prevent public disorder," *id.*, 890 F.2d at 1566 (internal citations omitted), lent support to its holding that the government had "only an attenuated interest in preventing plaintiff's speech." *Id.* 890 F.2d at 1567.

As the Tenth Circuit in *Flanagan* and Justice O'Connor in *National Treasury* recognize, there is no province in trying to discern if a protected expression or association is in regard to a matter of public concern if it is not about work or related to work; it is sufficient in such cases to simply engage in *Pickering* balancing to discern the effect the expression or association had on the workplace. Direct balancing in those situations gives true recognition to the constitutional difference between a protected "personal" matter, be it intimate association or membership in an expressive association, and an unprotected "personnel" matter. *See, e.g., Ross v. Clayton County, Georgia,* 173 F.3d 1305, 1311-12 (11th Cir. 1999) (exemplifying and citing cases directly applying Pickering balancing to personal conduct outside of the workplace).

III

Melzer's expressive activities, be they viewed in the context of freedom of speech, association or hybrid speech/association, neither occurred at work nor were about his work. Given that he was clearly engaged in protected constitutional activity, there is no purpose to engaging in public concern analysis before embarking upon *Pickering* balancing. In any event, Melzer's activities in promoting NAMBLA's principal mission to advocate the virtues of non age-related man/boy relationships, regardless of the lack of public approbation, would satisfy public concern analysis since they

clearly relate to matters of social concern to the community. See e.g. Blum, 18 F.3d at 1012 ("speech advocating the legalization of marijuana, criticizing national drug control policy, and debating civil disobedience on its face implicates matters of public concern").

Applying *Pickering* balancing, the focus must first turn to placing a value on the protected activity since "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. The value can range from "most limited," *Connick*, 461 U.S. at 154, to one of "significant weight." *Piesco*, 933 F.2d at 1157. What value should the Court place on Melzer's protected activities? It should not be dependent on the degree of disruption, which falls on the employer's side of the balancing ledger; nor should it be based upon majority sentiments. Here, value-based analysis can be aided by hypothetically considering whether Melzer could be terminated for being an active and outspoken member of an expressive association supporting the virtues of homosexuality for all consenting adults. There can be little doubt that there has been a marked societal shift in the level of tolerance and acceptance of adult homosexual relationships in recent times, and it is improbable that such associational activities outside of the school could today be outweighed by the perceived likelihood of school disruption. On the other hand, it seems equally apparent that advocating acceptance of homosexual relationships with those whose age may not lend itself to the capacity to make an informed consensual decision should not be on the same constitutional value scale.

IV

Turning to the resolution of the present case, it is doubtful whether any degree of disruption to the internal affairs

of the school could justify Melzer's firing if he simply were a passive member of an expressive association espousing unpopular, indeed repulsive, notions of age-related parameters of homosexual relationships. To hold otherwise would be to eviscerate the time-honored notion, even if such organization be deemed unlawful, that "those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens *or as public employees*." *Elfbrandt v. Russell*, 384 U.S. 11, 17, 16 L. Ed. 2d 321, 86 S. Ct. 1238 (1966) (emphasis added); *see also James,* 461 F.2d at 572 n.13 ("Although we can imagine situations in which a teacher would be so controversial because of his tenets or beliefs that he would be a disruptive force in the school, no one would suggest that he could be dismissed merely because he was identified with a particular cause if he did not preach that cause in class."). It is equally uncertain whether Melzer could be fired simply for external disruptions occasioned by the community's reactions since "the reaction of a community cannot always dictate constitutional protections to employees." *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985). However, the Court need not grapple with these issues since it has found that Melzer was discharged solely because of the likely disruption to the internal operations of the school as a consequence of the public exposure of the activities in which he participated during the course of his active, not passive, membership in NAMBLA. [15] *See id.* (differentiating between "passive" and "active" associational membership in supporting discharge of clerical employee in Sheriff's office). Given the limited First Amendment value that the Court ascribes to

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[15] The public exposure was caused by the NBC news story. Accordingly, the Court need not concern itself on this record with whether constitutional issues might arise if public exposure surfaced because of gratuitous inquiries by a public employer into an employee's associational activities.

Melzer's protected activities and the nature of his public employment, Melzer's dismissal from the teaching ranks, under the facts and circumstances of this case, was warranted.

Of paramount significance were Melzer's writings for and active participation as a member of the Collective in shaping the contents of the *Bulletin*, which writings were made available to the public. Considering the nature of his public employment, Melzer's constitutional right to actively participate in NAMBLA's expressive activities was bound to publicly surface, as Melzer himself acknowledged, and to reasonably be found by his public employer, after a careful and extensive investigation, to be "potentially disruptive" to the operations of the school and Melzer's future effectiveness as a teacher. *See Waters v. Churchill*, 511 U.S. 661, 677-78, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (reasonableness of prediction of disruption is based on degree to which employer undertook an investigation of situation and whether employer took "the care that a reasonable manager would use before making an employment decision - - discharge, suspension, reprimand, or whatever else - - of the sort involved in the particular case"). The Court attaches particular significance to the concerns of the student body, as articulated at its meetings, that students would not be able to concentrate in a classroom taught by a teacher who they knew advocated sex between men and boys, nor comfortably interact with the teacher, and the likelihood that students would refuse to attend Melzer's classes. In that regard, the Court credits the testimony of Dr. Lewittes that it would be "an extremely anxiety provoking and disruptive experience for the average child and adolescent" to be subjected to the feeling engendered by knowing that a teacher "has encouraged the disavowal or disruption of legal and moral codes that their families and the general community hold." Tr. at 1747-48. The Court also believes that Melzer's capacity to objectively assess situations requiring reportage of man/boy sexual encounters to

the authorities has likely been compromised since, as he candidly acknowledged, "it would be a very difficult conflict." Tr. at 4532.

CONCLUSION

Under the facts and circumstances of this case, Pickering balancing supports Melzer's discharge and dismissal of the complaint.

SO ORDERED.
FREDERIC BLOCK
United States District Judge

Dated: Brooklyn, New York
February 26, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002
(Argued December 3, 2002 Decided July 16, 2003)
Docket No. 02-7338

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PETER MELZER,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, CAROL A. GRESSER, IRENE IMPELLIZZERI, VICTOR GOTBAUM, MICHAEL J. PETRIDES, LUIS O. REYES, NINFA SEGARRA, DENNIS M. WALCOTT, individually and in their official capacities as members of the Board of Education of the City School District of the City of New York, RAMON CORTINES, individually and as Chancellor of the City School District of the City of New York, JOSEPH DEJESUS, individually and as Superintendent of the Bronx High Schools, HOLLIS NEEDLEMAN, individually and as Assistant Superintendent of the Bronx High Schools, EDWARD STANCIK, individually and as Special Commissioner of Investigation for the New York City School District and THE CITY OF NEW YORK,

Defendants-Appellees.

----------X

Before:
Van Graafeiland, cardamone, and Jacobs,

Circuit Judges.

Appellant Peter Meltzer appeals from a judgment after

a bench trial in the United States District Court for the Eastern District of New York (Block, J.) Entered on February 27, 2002. The district court dismissed all of appellant's claims under 42 U.S.C. § 1983 and the First Amendment of the United States Constitution brought against appellees Board of Education of the City School District of the City of New York, *et al.*

Affirmed.

Eugene B. Nathanson, New York, New York,
For Plaintiff-Appellant.

Ronald E. Sternberg, New York, New York
(Michael A. Cardozo, Corporation Counsel for the City of New York, Leonard Koerner, Jonathan Pines, New York, New York, of counsel),
For Defendants-Appellees.

Cardamone, *Circuit Judge:*

Among the liberties an American citizen enjoys is the right to associate with whomever he or she chooses for whatever purpose. That right, Alexis de Tocqueville observed in discussing it 168 years ago in his classic book is "almost as inalienable in its nature as [the right of] individual freedom." Alexis de Tocqueville, *Democracy in America* 184 (Harvey C. Mansfield & Delba Winthrop eds. & trans., U. Chi. Press 2000) (1835).

Peter Melzer (plaintiff or appellant), a New York City school teacher at Bronx High School of Science (Bronx Science or school) asserts that his constitutional rights to freedom of

association and speech were violated when the defendant Board of Education of the City School District of the City of New York (defendant or Board) terminated his teaching position. He alleges that action was taken in retaliation for his membership in the North American Man/Boy Love Association (NAMBLA or Association).

This appeal is from a judgment entered February 27, 2002 in the United States District Court for the Eastern District of New York (Block, J.), dismissing plaintiff's 42 U.S.C. § 1983 civil rights suit.

BACKGROUND

A. Facts Regarding Plaintiff

1. Teaching Record

Plaintiff was a school teacher and an employee of the defendant Board, having taught high school science for over 30 years from 1962 until his suspension in 1993, and his ultimate termination in 2000. He obtained tenure in 1968 as a physics teacher at Bronx Science, one of three highly selective science-oriented high schools in New York City. The school actively vies with New York's other two prestigious science high schools for the City's top students.

During his years at Bronx Science Melzer taught grades nine through 12. He participated in a number of school-related activities, including a volunteer program to teach physics to area junior high school students. He also served as an advisor to the Bronx Science Physical Science Journal and its Bicycle Club, and organized the Regional Science Olympiad. For his school activities and teaching he received several commendations.

2. Membership in NAMBLA

Melzer is a self described pedophile and admits to being sexually attracted to young males up to the age of 16. Despite this proclivity, the record before us reveals no evidence that plaintiff engaged in any illegal or inappropriate conduct at Bronx Science. Plaintiff's outlet as a pedophile is his participation in NAMBLA, which he joined in 1979 or 1980 to discuss with others his long-standing attraction to young boys.

NAMBLA's stated primary goal is to bring about a change in the attitudes and laws governing sexual activity between men and boys. It advocates the abolition of laws governing the age of consent for such activity and the abolition of laws that limit freedom of expression, including child pornography laws. It seeks to build a support network for men and boys, while educating the public on what it sees as the benevolent nature of its activities, and cooperating with the lesbian, gay, and other movements for sexual liberation.

Melzer became very active from early in his membership in NAMBLA and served it in a number of capacities. For over ten years he served intermittently as a member of NAMBLA's Steering Committee, a group that sets the Association's policy. He also served as the organization's treasurer and coordinated its fund- raising drives. Melzer's deep interest in the organization is further reflected in his attendance as one of three NAMBLA representatives at the 6th Annual International Pedophile and Youth Emancipation Conference in Amsterdam, the Netherlands, a meeting devoted to sharing information about the youth pedophile movement worldwide. Melzer co-founded NAMBLA's publication, the *Bulletin*, and at various times contributed articles and served as editor.

3. NAMBLA's Bulletin

The NAMBLA *Bulletin* is published ten times a year and features articles on topics of interest to members. The *Bulletin* is the self-described voice of NAMBLA. It is distributed by direct mail and sold to the public at select magazine and book stores.

Articles appearing in the *Bulletin* offer insight into the organization's beliefs and purpose, as well as the extent of Melzer's involvement. Issues of the *Bulletin* where Melzer is listed on the masthead as editor included articles like "Staying Safe and Happy as a Man/Boy Lover," which appeared in October 1993. The article proffered advice developed by NAMBLA activists on how to deal with police, how to store contraband erotica to escape discovery, and how to keep the specifics of a relationship with an underage boy secret from authorities. That advice included: never answer police questions, avoid keeping photos of underage boys where police may find them, never discuss the specifics of an illegal relationship with therapists or social workers, and secure legal representation before you need it. Another article appearing in the January-February 1993 *Bulletin* gave advice on how to identify susceptible children and lure them into sexual acts. Melzer stated later that although he did not agree with the article, he did not believe most people would take the advice.

A published letter to the editors of the *Bulletin*, entitled "Good Touches" appeared in the December 1992 issue. The letter graphically instructed readers on ways to touch specific body parts. In his capacity as editor, Melzer sanctioned such pieces in the "Letters" section of the *Bulletin* because he thought they had value.

Plaintiff himself wrote several articles. One entitled "Police Infiltrator," appearing in December 1986, recounted the activities of a detective from the Manhattan South Public Morals Division, who posed as a NAMBLA ally and arrested at least one NAMBLA member. In a follow-up article Melzer complained that the officer coerced vulnerable NAMBLA members into mailing copies of Melzer's *Bulletin* articles to his employer, the defendant Board. In 1987 the *Bulletin* also reprinted a letter to the editor of *Newsday* Melzer had written explaining that NAMBLA believes the ability and the right to experience sexual pleasure is a gift enjoyable by everyone regardless of age or sex. The letter further stated that erotic acts involving young people are not automatically abusive or exploitative.

B. Investigation of Plaintiff

1. Membership in NAMBLA Becomes Public

Melzer's membership in NAMBLA first came to the Board's attention in 1984-1985 via an anonymous letter received by the school's then principal. The Board's Office of the Inspector General conducted an interview with plaintiff on March 29, 1985, during which Melzer declined to confirm or deny whether he was a member of NAMBLA. No administrative action was taken at that time. The investigation was reopened in May 1992 by the newly created Office of the Special Commissioner of Investigation for the New York City School District (Commissioner of Investigation), an investigative body created to succeed the Office of the Inspector General.

During the course of the reopened investigation in March 1993, a local television station aired a three-part news story on public school teachers who were members of

NAMBLA. The story was broadcast on WNBC-TV Channel 4 in New York on March 2, 3, and 5, 1993. It featured a secretly recorded video of a NAMBLA meeting at which Melzer could be seen advising a non-tenured employee of the Board to keep his Association membership secret until he acquired tenure. The story also featured interviews with students, as well as an attempted interview with Melzer himself. Other news media soon picked up the story and further disseminated the fact that Melzer, a teacher at Bronx Science, was a NAMBLA member.

2. Response by Bronx Science High School Community

In the wake of this media attention, Melzer became the center of heated discussion in the Bronx Science community. School principal Vincent Galasso attempted to prevent the airing of the first segment of the Channel 4 series, but was told by an NBC reporter, "not on your [expletive deleted] life." Galasso thereupon convened a number of school officials to discuss his concerns about Melzer and the attendant publicity. Since plaintiff was on sabbatical for the 1992-93 school year, the discussion focused on whether he should be allowed to return the following year. Galasso spoke to nearly 100 teachers and school officials, many of whom shared his concerns about whether Melzer should be teaching children and the effect the news story would have on student recruitment.

The Bronx High School of Science Parents' Association met to discuss the issue on March 3, 1993, right after the first installment of the news story was broadcast. Many of the 50 or 60 parents in attendance expressed anger at Melzer's NAMBLA affiliation. They threatened to remove their children and conduct a sitdown strike at the school if Melzer were allowed to return. A letter was drafted to the Board of Education Chancellor, the Mayor, and other public officials demanding that Melzer and any other known member of NAMBLA not be

in a position of daily contact with the students at Bronx Science, or of any other New York City public school. In a personal meeting with the Chancellor, parents' association representatives strongly urged that Melzer not be permitted to return to the classroom, threatening to boycott the school and to call the news media if their views were ignored.

The students themselves held a 300-400 person assembly on March 11, 1993, where a majority of the 30-40 students who spoke opposed plaintiff's continued employment. A few students, however, expressed the view that a person not convicted of anything illegal should be allowed to practice his profession. School publications ran articles expressing opinions on both sides of the controversy. One stated that no matter how strange an organization may appear, people have the right to express their views, while another said plaintiff's actions should be condemned as "utterly detestable." Galasso estimated that over 90 percent of the student body was unhappy with Melzer's membership in NAMBLA.

Based on these reactions from the school community, Galasso decided that allowing Melzer to return to the classroom would be detrimental to the school. In September 1993 the Commissioner of Investigation issued its report recommending disciplinary action in Melzer's case. The report stated that it had examined the issues and concluded that serious disruption, as well as permanent loss of parental confidence is inevitable if Melzer is returned to the classroom. The investigation report concluded that articles in the *Bulletin* could serve as an instruction manual for the sexual abuse of children and can reasonably be assumed to have led to such abuse.

C. Disciplinary Proceedings

As a result of this report, the Board filed disciplinary

charges against plaintiff stating that he had "advanced the goals and activities of NAMBLA, and assisted in the publication of the NAMBLA *Bulletin*, including at times editing, writing and raising funds for this publication, all of which promoted illegal sexual activity between male adults and male children under the age of consent." Further, the Board charged that Melzer's activities had been widely reported, had caused disruption in his school and the school community, and had undermined his ability to serve as a teacher. Melzer requested a hearing pursuant to New York Education Law § 3020-a to contest the charges. After 30 days of hearings held over the course of three years, the hearing officer recommended that Melzer be terminated. The Board upon receipt of this recommendation dismissed plaintiff.

D. Prior Legal Action

Melzer brought the instant § 1983 action in the Eastern District challenging his dismissal by the defendant Board. The district court conducted a bench trial, and in affirming the Board's decision, see *Melzer v. Bd. of Educ.*, 196 F. Supp. 2d 229 (E.D.N.Y. 2002), found credible Galasso's reports of significant disruption at the high school. It concluded that "Melzer was terminated solely because his employer reasonably believed that the public exposure of [Melzer's] associational activities . . . was likely to impair Melzer's effectiveness as a teacher and cause internal disruption if he were returned to the classroom." *Id.* at 245. The threat of such disruption, the district court believed, weighed more heavily than Melzer's rights to speech and association. *Id.* at 250-52.

With this factual background in mind, we turn now to a discussion of the legal issues.

DISCUSSION

I Pickering Test for Public Employees' Speech

A. In General

The First Amendment protects the speech and association rights of an individual like Melzer, no matter how different, unpopular or morally repugnant society may find his activities. Nonetheless, it has been established law for over 30 years, since the Supreme Court decided *Pickering v. Board of Education*, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). Thus, the government may impose restraints on the First Amendment activities of its employees that are job-related even when such restraints would be unconstitutional if applied to the public at large. See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995) (*Treasury Union*).

Under what is now called the *Pickering* balancing test, public employees like plaintiff teacher do not leave their First Amendment rights at the schoolhouse door, even though it is plain that those rights are somewhat diminished in public employment. The test requires a court to consider the most appropriate possible "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568 (hereafter *Pickering* or balancing test). The balancing test allows the government a degree of control over its employees to permit it to provide services to the public efficiently and effectively, *see*

Connick v. Myers, 461 U.S. 138, 150-51, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); *see also Waters v. Churchill*, 511 U.S. 661, 675, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994)(plurality opinion), but ensures that public employers do not use their authority to silence discourse "not because it hampers public functions but simply because superiors disagree with the content of [the] employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987).

B. Pickering's Two-Step Approach

The *Pickering* test involves a two-step inquiry: first, a court must determine whether the speech which led to an employee's discipline relates to a matter of public concern; and, second, if so, the balance between free speech concerns is weighed against efficient public service to ascertain to which the scale tips. *See Rankin*, 483 U.S. at 384, 388.

The first part of the inquiry, commonly referred to as the public concern test, serves a gatekeeping function for employee speech claims in federal courts. The First Amendment protects an employee only when he is speaking "as a citizen upon matters of public concern" as opposed to when he speaks only on matters of personal concern. *Connick*, 461 U.S. at 147. If the speech that led to an employee's discipline was on a personal matter -- for example, a complaint about a change in an employee's duties -- the government is granted wide latitude to deal with the employee without any special burden of justification. *Treasury Union*, 513 U.S. at 466; *Connick*, 461 U.S. at 148-49.

When it is shown that the employee's speech was on a matter of public concern, the second step, or balancing portion of the test, comes into play. Under it the government has the burden of showing that despite First Amendment rights the

employee's speech so threatens the government's effective operation that discipline of the employee is justified. *See Treasury Union*, 513 U.S. at 466.

For an employee to prevail he or she must also demonstrate that the speech was the motivating factor causing the public employer to take adverse action. *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998). Even when the government cannot show a compelling justification under *Pickering* for infringing on its employee's rights, the government still may succeed if it can demonstrate that it would have undertaken the same adverse employment action even absent the protected speech. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). By the same token, when the government prevails in the balancing test, the employee may still carry the day if he can show that the employer's motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption. *See Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996).

II Applicability of *Pickering* to Hybrid Speech/Associational Activities Unrelated to Employment

A. Distinction Between This Case and Ordinary Speech Cases

The claim before us diverges from the usual line of cases requiring application of *Pickering*, which ordinarily applies in situations involving speech directed at an employer, made at the place of employment or directly concerning the employer in some way. See, e.g., *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (employee proselytizing clients while on public business); *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000) (report critical of employer's policies); *Clue v. Johnson*, 179 F.3d 57 (2d Cir. 1999) (union faction's criticism of management labor policies); *Lewis v. Cowen*, 165 F.3d 154

(2d Cir. 1999) (objections to policies of Connecticut Gaming Board by Board employee); *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997) (police commissioner's criticism of police department); *Sheppard*, 94 F.3d at 826 (law clerk's criticism of judge); *Piesco v. City of New York Dep't of Personnel*, 933 F.2d 1149 (2d Cir. 1991) (senior personnel director's truthful testimony before state senate committee); *Lefcourt v. Legal Aid Soc'y*, 312 F. Supp. 1105 (S.D.N.Y. 1970), *aff'd*, 445 F.2d 1150 (2d Cir. 1971) (legal aid attorney's criticism of supervisor's policies disrupting internal operations).

The present case is unlike the above cited cases in two ways. One is that Melzer's termination stems not from something done in the workplace, but from First Amendment activities occurring outside the workplace and largely unconnected to it. The second is that the activity which prompted the Board to fire Melzer was not a specific instance of speech, or particular disruptive statement, but an associational activity of which speech was an essential component. Melzer's termination did not directly stem from any particular words he said or printed -- the most inflammatory articles appearing in the *Bulletin* were not written by Melzer himself, and most of Melzer's admissions about his sexual preference were made after and as result of the scandal at Bronx Science. Although the Board's report cited the foregoing pieces of evidence in support of their decision, it is clear that the Board's basic justification for firing Melzer was the community's reaction to the message advocated by NAMBLA, its *Bulletin*, and Melzer himself through his active participation in the organization. Nonetheless, our view is that *Pickering* remains the applicable test.

B. Applicability of Pickering

Several considerations prompt us to believe *Pickering*

is the appropriate standard here. Addressing the first point of divergence -- that the activity in question took place away from the workplace -- we recognize that the balancing test's application is not limited to conduct occurring at or directly relating to the workplace. The Supreme Court in *Treasury Union* applied the *Pickering* test to a law that prohibited honoraria to government employees giving speeches outside their place of work, the content of which was unrelated to the speechmaker's employment. 513 U.S. at 466. The Court instructed that although the situation fell outside the typical paradigm, the goal of striking an appropriate balance between employee and government interests is activated whenever the government seeks to regulate employees' protected speech, regardless of where it occurs or how closely it is related to work. *Id.* Attenuation of time, place, or content of speech from the workplace is ultimately accounted for in the balancing part of the process, but those factors will not absolutely preclude government regulation.

We and at least one other Circuit have likewise recognized the balancing test's applicability to a wider range of issues than just those arising in or concerning speech occurring at the workplace. See *Pappas v. Giuliani*, 290 F.3d 143, 150 (2d Cir. 2002) (applying *Pickering* to police officer's speech made privately, off-duty and away from work); *Bieluch v. Sullivan*, 999 F.2d 666 (2d Cir. 1993) (applying balancing test to speech made in course of political community activities unrelated to work); *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989) (applying such test to non-work related "speech" embodied in pornographic movies purveyed away from work).

Taking the second point of divergence from the usual *Pickering* paradigm -- Melzer's termination did not arise solely out of specific disruptive statements -- we think the balancing test is nonetheless appropriate. The root of the disruption at

Bronx Science cannot be identified discretely as either Melzer's associational activities or the attendant speech, for the two are dependent on one another. Membership in NAMBLA was, surely, an associational activity. However, NAMBLA's primary purpose was advocacy, and Melzer, by his active participation and his role as editor of the *Bulletin*, furthered this advocacy. Thus, interconnecting associational and speech rights are in play.

Several circuits, including our own, have labeled such claims involving multiple First Amendment rights "hybrid" claims. *See, e.g., Knight*, 275 F.3d at 167; *Balton v. City of Milwaukee*, 133 F.3d 1036, 1041 (7th Cir. 1998) (Cudahy, J., concurring in the judgment); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995). Our analysis is unaffected by the presence of rights to both association and speech. We have recognized that where multiple branches of First Amendment protection are implicated by an employment decision, the affected rights enjoy no more protection than each would receive when viewed separately. *See Knight*, 275 F.3d at 167. Thus, we will protect plaintiff's interests adequately if we afford a level of Constitutional protection warranted for both speech and association.

Plaintiff's right to speech is undoubtedly amply protected by the *Pickering* test. See *Treasury Union*, 513 U.S. at 466. Associational rights, when exercised in conjunction with speech, are also sufficiently protected by *Pickering*. We note that in some public employment contexts the right of association is given heightened protection, such as when low-level public employees engage in partisan political activities in opposition to their bosses' own political party. *See Elrod v. Burns*, 427 U.S. 347, 360-64, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 518-20, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980). But we have ruled that

such heightened protection is limited to the context of partisan political conduct. See *McEvoy,* 124 F.3d at 99 n.4; *Regan v. Boogertman,* 984 F.2d 577, 581 (2d Cir. 1993). By contrast, where non-partisan associational activity involves speech and causes disruption to the workplace, a balance between government and employee rights adequately protects the interests of both. *Cf. Branti,* 445 U.S. at 517 (noting the importance of balancing government and employee interests, but finding employee interests protected when partisan political affiliation among low-level employees is involved); *Regan,* 984 F.2d at 581 (same); *see also Selzer v. Fleisher,* 629 F.2d 809, 815 (2d Cir. 1980) (Kaufman, J., concurring in part and dissenting in part) (arguing for application of *Pickering* to associational claim: "the right to associate freely is not absolute, particularly where its exercise conflicts with the duties and responsibilities of a governmental employee").

Moreover, we have found *Pickering* to be the appropriate standard where both expressive and associational activities are involved. In *Clue,* we applied *Pickering* to an adverse employment action arising out of employees' union-related pamphleteering and petitioning. 179 F.3d at 60-61. Although describing the claim as a purely associational one, the union activities in question more closely resembled the "hybrid" speech and association we find in the present case. Accordingly, we believe *Pickering* similarly protects plaintiff's speech and associational rights in the instant case.

III Applicability of Public Concern Test

Having determined that *Pickering* provides the correct framework for our analysis, we turn to its application here. The first step in the analysis, the public concern threshold to First Amendment protection, was set forth in *Connick,* 461 U.S. at 146- 48, as a logical extension of *Pickering*; before we afford

protection to a discharged employee, the public concern test requires us to find that the employee was speaking "as a citizen, in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568.

Application of the public concern test is made awkward in this case given the hybrid speech/associational nature of the rights involved. Whether an employee's First Amendment activity relates to a matter of public concern is ordinarily a question of law decided on the whole record by taking into account the content, form, and context of a given statement. *See Connick*, 461 U.S. at 147-48 & n.7; *Lewis*, 165 F.3d at 163; *Luck v. Mazzone*, 52 F.3d 475, 476 (2d Cir. 1995) (per curiam). But, a court making that same decision when examining rights such as those asserted here, faces the fact that an association engaged in advocacy may deliver many different statements at many different times and places and under many different circumstances. What statements, at what locations and in what context are the ones that should be analyzed is shrouded in uncertainty. In rare situations, all of an employee's statements may be matters of public concern because they are made away from the workplace and relate to the interchange of ideas. In most situations, some statements are found to be of public concern, while others are not. It would be problematic for a court to determine whether the activity of an association -- that speaks and acts in a myriad of different ways -- relates to a matter of public concern.

For this reason, courts have questioned whether the public concern test is appropriate in cases like the present one. *See Treasury Union*, 513 U.S. at 480 (O'Connor, J., concurring in part and dissenting in part) (recognizing no need for public concern test prior to applying *Pickering* balancing test to "off-hour speech bearing no nexus to Government employment -- speech that by definition does not relate to 'internal office

affairs' or the employee's status as an employee"); *Clue*, 179 F.3d at 61 n.2 (questioning need for public concern test in associational claims involving speech); *Flanagan*, 890 F.2d at 1562-63 (refusing to apply test to off-duty First Amendment activity).

Yet, we need not resolve the public concern issue in the case at bar because it is not critical to the outcome. For purposes of Melzer's claims, we assume *arguendo* that his activity centers on a matter of public concern, and is thus protected. *See Pappas*, 290 F.3d at 146 (assuming *arguendo* that speech was a matter of public concern). In addition, we observe that even if we were somehow to parse Melzer's activity into the public concern test, most of it would likely pass. NAMBLA's stated goal is to effect change in attitudes and laws regarding age of consent. The bulk of Melzer's activity, advocacy, and speech support this goal. Advocacy for a change in public perception and law, a fundamental component of democracy, is certainly a matter of public concern, regardless of the underlying subject matter. Consequently, we assume Melzer's activity is protected and move to the next part of the *Pickering* test.

IV The Balancing Test Applied to Appellant's Claim

A. Government's Burden

To satisfy *Pickering* and justify adverse action arising out of an employee's protected activity, the government has the burden to show that the employee's activity is disruptive to the internal operations of the governmental unit in question. *See Connick*, 461 U.S. at 150; *see also Knight*, 275 F.3d at 164; *Lewis,* 165 F.3d at 163. The disruption must be significant enough so that it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working

relationships . . . or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388.

Any actual disruption that has already occurred is of course a persuasive argument for the government that it has met its burden, but even a showing of probable future disruption may satisfy the balancing test, so long as such a prediction is reasonable. *See Waters*, 511 U.S. at 673 (plurality opinion) (giving "substantial weight to government employers' reasonable predictions of disruption"); *Heil*, 147 F.3d at 109 (holding "government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities" in a manner outweighing employee's interests). In balancing protected First Amendment activity against governmental disruption we take into account the "manner, time, and place" in which speech or activity occurred, *see Connick*, 461 U.S. at 152; *Lewis*, 165 F.3d at 162, keeping in mind that the government is more likely to meet its burden when an employee's disruptive activity occurs in the workplace than when the equivalent activity occurs on an employee's own time, away from work. *See Connick*, 461 U.S. at 152-53 & n.13.

The content of the disruptive speech must also be considered. The more speech touches on matters of public concern, the greater the level of disruption the government must show. *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995). Extending this notion to hybrid speech/associational activities where possible, the more the association in question centers around expressive activities relating to matters of public concern, the greater the government's burden to show disruption.

A final but important consideration in the balancing test

is the nature of the employee's responsibilities. The level of protection afforded to an employee's activities will vary with the amount of authority and public accountability the employee's position entails. *See Rankin*, 483 U.S. at 390-91. A position requiring confidentiality, policymaking, or public contact lessens the public employer's burden in firing an employee for expression that offends the employer. *See McEvoy,* 124 F.3d at 103.

In conducting the balancing test we do not purport to assign a certain value to appellant's activities because to do so invites devaluation of that speech with which one personally disagrees. And, we would not state, as the district court did, that Melzer's activities are on a different constitutional value scale than other types of First Amendment rights more widely accepted by society. The balancing test is less a matter of calculating and comparing absolute values than it is a process that looks at all the circumstances in a given situation and determines which interest weighs more heavily. *See id. at 98 n.3; Brewster v. Bd. of Educ.*, 149 F.3d 971, 979-80 (9th Cir. 1998).

Appellant's rights are not diminished by the fact that, as the Commissioner's investigation report states, some of NAMBLA's publications could be read as an "instruction manual" for illegally molesting children and can "reasonably be assumed to have led to . . . abuse." Under our system an individual cannot be punished for associating with an organization or engaging in advocacy, absent a clear showing either that the organization is actively engaged in illegal activity or the advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969) (per curiam); *see also Hess v. Indiana*, 414 U.S. 105, 108, 38 L. Ed. 2d 303, 94 S. Ct. 326 (1973) (per

curiam) (advocating "illegal action at some indefinite future time" is protected).

Even were it shown on this record -- and it is not -- that some of NAMBLA's members engage in illegality, or that the organization's aims are in fact illegal, Melzer himself could not be punished absent clear proof -- also not present here -- that he knew of such illegal aims and specifically intended to accomplish them. *See Elfbrandt v. Russell*, 384 U.S. 11, 15, 19, 16 L. Ed. 2d 321, 86 S. Ct. 1238 (1966); *Scales v. United States*, 367 U.S. 203, 229, 6 L. Ed. 2d 782, 81 S. Ct. 1469 (1961); *Noto v. United States*, 367 U.S. 290, 299, 6 L. Ed. 2d 836, 81 S. Ct. 1517 (1961). Because we assume that Melzer's First Amendment activity possesses the highest value, it therefore places a heavy burden on the Board to justify dismissal.

B. Balancing Test Satisfied

With the government's burden of proof in mind, we turn to an analysis of appellant's primary challenges to defendant's case against him. In so doing, because this case involves constitutional issues, our review is de novo. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648-49, 147 L. Ed. 2d 554, 120 S. Ct. 2446 (2000). At the outset, we note that we conduct our evaluation of appellant's rights versus governmental interest bearing in mind his position as a teacher in a public school. This position by its very nature requires a degree of public trust not found in many other positions of public employment. Although we recognize the danger in allowing the government to take action against an employee for his off-duty affiliations, in the context of teaching schoolchildren Melzer's activities strike such a sensitive chord that, despite the protection afforded his activities, the disruption they cause is great enough to warrant the school's action against him. We examine that

action in light of appellant's challenges.

1. Disruption

(a) *Reported.* Appellant attempts to minimize the reported disruption at the school, casting doubt on Galasso's assessments in particular, questioning the number of students and teachers with whom he spoke, and the tenor of the conversations. It is true that some parents and students expressed support for Melzer as a person harmlessly expressing his ideas. It is nonetheless entirely reasonable for the Board to believe that many parents and students had a strong negative reaction to him, and that such a reaction caused the school to suffer severe internal disruption. The discrepancies appellant points out in Galasso's assessments are minor and immaterial. Thus, we see no reason to disturb the district court's findings of disruption in the Board's favor.

(b) *Predicted.* Appellant contends that significant disruption cannot be predicted from the record before us. Quite the contrary, we think there is strong proof that Melzer's return to his teaching post would compromise the learning environment, particularly because of his effect on two critical constituencies -- the students and the parents. An expert in psychology testifying for the Board stated that having a teacher with beliefs such as Melzer's would provoke anxiety and be a disruptive experience for the average student. He believed students would likely be unable to concentrate in plaintiff's class or be uncomfortable asking him for help after class or in any other one-on-one situation.

Melzer's position as a school teacher is central to our review. He acts in loco parentis for a group of students that includes adolescent boys. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995).

At the same time, he advocates changes in the law that would accommodate his professed desire to have sexual relationships with such children. We think it is perfectly reasonable to predict that parents will fear his influence and predilections. Parents so concerned may remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents, teachers, and administrators. The Board contends as well that parental concern would compromise the competitive position of this high school vis-a-vis other elite high schools in New York City. While not a central concern, this also matters.

We also note, as the district court did, that disruption may arise from Melzer's possible inability to fulfill his duties as a teacher. Appellant candidly acknowledged that it would be difficult for him to decide whether to report an incident of child molestation at the school. Not only is reporting such incidents a part of any teacher's duties, lack of confidence in Melzer's will to do so would further undermine the trust of students and parents alike. Given all of the foregoing, we think the school authorities' predictions of further disruption should Melzer return find full support in the record. *See Waters*, 511 U.S. at 673.

2. Heckler's Veto

Appellant maintains, in addition, that allowing disruption caused by public furor over his NAMBLA-related activities to justify his termination amounts to an impermissible heckler's veto. We acknowledge the truism that community reaction cannot dictate whether an employee's constitutional rights are protected. *See McMullen v. Carson*, 754 F.2d 936, 940 (11th Cir. 1985). We also recognize that allowing the public, with the government's help, to shout down unpopular ideas that stir anger is generally not permitted under our

jurisprudence. *See Feiner v. New York*, 340 U.S. 315, 320, 95 L. Ed. 295, 71 S. Ct. 303 (1951) ("We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."); *Flanagan*, 890 F.2d at 1566-67.

Yet, Melzer's position as a teacher leaves him somewhat beholden to the views of parents in the community. Parents are not outsiders seeking to heckle Melzer into silence, rather they are participants in public education, without whose cooperation public education as a practical matter cannot function. Any disruption created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be accounted for in the balancing test and which may outweigh a public employee's rights. In consequence, we do not perceive an impermissible heckler's veto implicated in this case. *Cf. Pappas*, 290 F.3d at 146-47 (allowing community reaction to serve as basis for discharge of police officer).

3. Retaliation for Protected Activity

Finally, Melzer insists that the Board's decision to terminate him is really motivated by a desire to retaliate against him for his NAMBLA membership, and not the disruption that his association causes. We find no proof in the record of retaliatory motive, nor was such evidence presented in any of the proceedings below. The fact that the Board knew of Melzer's NAMBLA membership as early as the mid-1980s and did not terminate him until after his membership became public knowledge makes it highly implausible that a retaliatory motive was the lever for the Board's action dismissing him.

CONCLUSION

In sum, appellant's freedom to associate with and advocate for NAMBLA is protected by the First Amendment. The Board nonetheless meets its burden under *Pickering* by demonstrating that plaintiff's association and his degree of active involvement in NAMBLA caused disruption to the school's mission and operations justifying the Board's action terminating him.

Accordingly, for the reasons stated, the judgment appealed from is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 26 day of September two thousand three.

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PETER MELZER,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, CAROL A. GRESSER, IRENE IMPELLIZZERI, VICTOR GOTBAUM, MICHAEL J. PETRIDES, LUIS O. REYES, NINFA SEGARRA, DENNIS M. WALCOTT, individually and in their official capacities as members of the Board of Education of the City School District of the City of New York, RAMON CORTINES, individually and as Chancellor of the City School District of the City of New York, JOSEPH DEJESUS, individually and as Superintendent of the Bronx High Schools, HOLLIS NEEDLEMAN, individually and as Assistant Superintendent of the Bronx High Schools, EDWARD STANCIK, individually and as Special Commissioner of Investigation for the New York City School District and THE CITY OF NEW YORK,

Defendants-Appellees.

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Docket No. 02-7338

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Peter Meltzer.

Upon consideration by the panel that decided

the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By:

S/_____
Laura Bass Penn
Motions Staff Attorney